

NO. 45269-3-II  
(Clark County Superior Court Cause No. 12-2-02455-7)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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Klickitat County,

Appellant,

v.

FRIENDS OF THE WHITE SALMON RIVER and  
FRIENDS OF THE COLUMBIA GORGE,

Respondents.

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**Klickitat County's Opening Brief**

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## **GLOSSARY**

<b>FOCG</b>	Friends of the Columbia Gorge and Friends of the White Salmon River
<b>EIS</b>	Environmental Impact Statement
<b>GMA</b>	Growth Management Act, Ch. 36.70A RCW
<b>KCC</b>	Klickitat County Code
<b>MDNS</b>	County's Mitigated Determination of Non-Significance, which includes an Addendum and Four Incorporated EIS's
<b>Ordinance</b>	Klickitat County Ordinance O060512-1
<b>Resolution</b>	Klickitat County Resolution 08612
<b>SEPA</b>	State Environmental Policy Act, Ch. 43.21C RCW

## 1. INTRODUCTION AND SUMMARY OF ARGUMENT

Klickitat County asks this Court to reverse the superior court's summary judgment decision and uphold: (1) the County's rezone legislation; and (2) the County Hearing Examiner's decision affirming the County's environmental review under SEPA.<sup>1</sup> The rezone authorizes, over a twenty year planning period, development of 259 additional residences within the 50,000 acre Husum BZ Corner Planning Area.<sup>2</sup>

As a rural jurisdiction with limited population growth, the County does not fully plan under GMA.<sup>3</sup> Given land use planning is largely voluntary, the County debated whether it should plan for growth.<sup>4</sup> Without County action, growth will occur in a more haphazard manner.<sup>5</sup>

The County considered the issue for over five years.<sup>6</sup> Ultimately, although growth occurs slowly, the County elected to encourage it where:

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<sup>1</sup> Citations are to the Administrative Record (AR), Clerk's Papers (CP), and Superior Court Transcript (TR). The Clerk transmitted the Hearing Examiner SEPA Exhibits to the Court via CD. SEPA Exhibit citations include both the AR bate stamp and Examiner's Exhibit number. Citations to SEPA Hearing Transcripts include the CP bate stamp, hearing date, and original page number.

<sup>2</sup> AR 210983 (SEPA Ex. 44, Staff Memo); AR 210628-646 (SEPA Ex. 22, spread sheets); AR 5 (Board Decision) Finding D-10; AR 953 (Examiner Decision) Findings 2.3.9-10; CP 697-700 (TR, SEPA Hearing, December 20, 2011, pgs. 361-64, County testimony, development capacity); CP 827-828 (TR, SEPA Hearing, January 23, 2012).

<sup>3</sup> RCW 36.70A.040.

<sup>4</sup> AR 60 (Q&A Sheet); AR 199 (Fact Sheet) ("In sum, this is the County's choice: focus residential development where it is naturally occurring, or spread it out over the entire planning area.")

<sup>5</sup> CP 60 (Q&A Sheet) (Without the proposal, "a greater proportion of this growth will disperse across the Planning Area."); CP 199 (Fact Sheet); AR 4 (Ordinance), Finding D-1 ("The Update centers on a policy question on whether to focus development within these limited portions of the Planning Area (less than 4% of it), located along Highway 141, which are more developed than the Planning Area's outlying, more rural sections.")

<sup>6</sup> AR 70 (Staff Report); AR 199 (Fact Sheet).



(1) public investments in transportation facilities and utility infrastructure have been made; and (2) land is more developed and divided.<sup>7</sup>

The County zoning changes do not significantly alter allowable densities.<sup>8</sup> The County's pre-existing Resource Lands zoning had allowed a confusing mix of 1/4 acre to 20 acre lots.<sup>9</sup> Within the area rezoned, the County opted to require predictable lot sizes of one and two acres; to increase minimum lot size near two key tributaries to the White Salmon River from 5,000 square feet to a one acre minimum; and, to double White Salmon River setbacks for any property owner developing under RR2 zoning (one unit per two acres) proximate to the River.<sup>10</sup>

In addition, the County restricted how the outlying Resource Lands zoning could be used. Resource Lands density assignments are now subject to public notice, and for certain decisions, land must be permanently protected for natural resource use.<sup>11</sup>

The County determined that these measures would better protect timber, agriculture, and ranching uses in the Planning Area, promote more cost effective infrastructure, and better address environmental concerns.<sup>12</sup>

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<sup>7</sup> AR 199 (Fact Sheet); *see also* AR 4-5, 9 (Board Findings) D-1, D-10, and J-1.

<sup>8</sup> AR 5 (Ordinance), Finding D-8 ("[D]ensities are not expected to dramatically increase.")

<sup>9</sup> AR 215922 (SEPA Ex. 151, KCC 2.26:8: "The maximum number of dwelling units per acre shall be four (4) except when otherwise approved by the Board of Adjustment for multi-family residential use."); AR 215923 (SEPA Ex. 151, KCC 2.26:8, density assignments ranging from four dwelling units per acre to one per 20 acres).

<sup>10</sup> AR 5-7 (Ordinance), Findings D-9, E-4, E-9; AR 12 (zoning map).

<sup>11</sup> AR 44 (KCC 19.53.050(B); AR 47 (KCC 19.53.120); AR 55 (A.040(B)) and AR 57).

<sup>12</sup> AR 9 (Ordinance), Findings J-1 - J-4.

This rural “sub-community” expects a planned increase of 259 residences over 20 years.<sup>13</sup> In sum, by engaging the community throughout a lengthy process, and planning for growth, the County can better plan for development, limited though it is.

Although the rezone reduced impacts, the County reviewed it through SEPA. Initially, the County issued a determination of non-significance.<sup>14</sup> When that was appealed, the Board of County Commissioners remanded for additional analysis.<sup>15</sup> On remand, the Planning Department retained water resource experts to prepare a hydrologic analysis. The analysis addressed impacts associated not with the 259 additional residences, but a range of development scenarios, including an alternative with up to 3,815 residences.<sup>16</sup> These figures exceed growth expected for the **entire** County through 2030.<sup>17</sup> But, even under the consultant's improbably high growth levels, the report concluded impacts could be mitigated.<sup>18</sup>

Satisfied that there were no probable, significant adverse impacts, the County issued an MDNS which incorporated the hydrologic analysis, prepared an Addendum, and incorporated four EIS's, including the White

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<sup>13</sup> FN 2 above; AR 210983 (SEPA Ex. 44, Staff Memo), *see* underlying data at AR 210628-646 (SEPA Ex. 22); AR 2.3.9 (Examiner Decision, Finding 2.3.9); AR 5 (Ordinance, Finding D-10).

<sup>14</sup> AR 209853 (SEPA Ex. 8, DNS).

<sup>15</sup> AR209854-6 (SEPA Ex. 9, Resolution 11908).

<sup>16</sup> AR 200079 (SEPA Ex. 2, Hydrologic Report, Table 1.2); *see also* AR 200043 (SEPA Ex. 2, Hydrologic Report, p. 10).

<sup>17</sup> AR 210986 (SEPA Ex. 44, state's population projections); *see also* AR 60, 4<sup>th</sup> para.

<sup>18</sup> AR 200037-40 (Hydrologic Report, pgs. 4-7).

Salmon River EIS, which analyzes impacts from development within the exact area rezoned.<sup>19</sup>

Following FOCG's appeal,<sup>20</sup> the County Hearing Examiner held a three day evidentiary hearing, and entered findings of fact upholding the County's SEPA review.<sup>21</sup> The Board of County Commissioners then took additional public testimony, and adopted the Ordinance and Resolution.<sup>22</sup>

FOCG appealed to superior court but did not challenge a single Examiner or Board finding.<sup>23</sup> The County filed for summary judgment on FOCG's constitutional claims, unlawful delegation claim under Ch. 36.70 RCW, and spot rezone claim.<sup>24</sup> FOCG filed a cross motion for summary judgment on SEPA, Comprehensive Plan Consistency, and the spot rezone claims.<sup>25</sup> The superior court granted FOCG its motion and denied the County's. The County appealed to this Court.<sup>26</sup>

Although sitting in its narrow appellate capacity, on cross motions for summary judgment, the superior court failed to defer to the County's legislative choices and SEPA review. As the legislation was not wholly arbitrary, and the SEPA review was not clear error, the superior court

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<sup>19</sup> AR 200135-142 (SEPA Ex. 4, White Salmon EIS, pgs. S-5 – S-9) (summarizing alternatives, and AR 200492-496 (maps showing area reviewed).

<sup>20</sup> The Yakama Nation also appealed. The County sponsored mediation with both the Nation and FOCG. A settlement agreement between the County and Nation resulted in added cultural resource protections. AR 857-62.

<sup>21</sup> AR 947-978.

<sup>22</sup> AR 1-57.

<sup>23</sup> CP 277-304 (Amended Complaint).

<sup>24</sup> See CP 942-3 (County's Summary Judgment Motion, pgs. ii-iii).

<sup>25</sup> See CP 1275-76 (FOCG's Summary Judgment Motion, pgs. 53-54).

<sup>26</sup> CP 1543-1552 (County's Notice of Appeal, attaching Final Order and Judgment).

should have upheld both. Further, as FOCG failed to challenge the Examiner's and Board's findings, there were no material issues of fact and the County was entitled to summary judgment as a matter of law.

## **2. ASSIGNMENTS OF ERROR**

### **2.1. County Summary Judgment Motion**

The superior court erred in denying the County's summary judgment motion to dismiss FOCG's: (1) constitutional claims, including its federal separation of powers, due process, equal protection claims; (2) unlawful delegation claim under Ch. 36.70 RCW; and (3) spot rezone claim. CP 1536-42.

### **2.2. FOCG's Summary Judgment Motion**

The superior court erred in granting FOCG's summary judgment motion on: (1) its SEPA claims; (2) comprehensive plan consistency claims; (3) spot zoning claim; and (4) unlawful delegation claim. CP 1536-42.

### **2.3 Superior Court Decisions**

The superior court erred in entering the: (1) letter ruling; (2) order on cross-motions; and (3) final judgment incorporating these decisions. CP 1536-42.

## **3. ISSUES PRESENTED FOR REVIEW**

1. Did the superior court err in granting FOCG summary judgment on SEPA, as: (1) FOCG failed to identify a single probable, significant adverse impact either not mitigated or addressed by EIS; (2) the Hearing Examiner's unchallenged

findings of fact are verities on appeal, thus settling all disputed facts in the County's favor and precluding summary judgment in favor of FOCG; (3) the County's mitigation measures adequately address impacts, are reasonable and capable of being accomplished, and provide more mitigation than SEPA requires; (4) SEPA encourages incorporating EIS's, which the County did consistent with SEPA; (5) there is no SEPA requirement to consider alternatives in an MDNS, although the County did so; and (6) the County action reduces, rather than increases environmental impacts?

2. Did the superior court err in not dismissing FOCG's spot rezone claim, and granting FOCG summary judgment, where the County's overlay zoning is virtually the same as the surrounding zoning, and was adopted to address legitimate public concerns, as set forth in unchallenged findings of fact?
3. Did the superior court err in not dismissing FOCG's constitutional claims where FOCG presented no responsive argument, erroneously believing the analysis for these claims is indistinguishable from a spot rezone argument?
4. Even if FOCG had submitted responsive argument on the constitutional claims:

4.1 Did the superior court err in not dismissing FOCG's federal separation of powers claim, because: (1) the clause does not apply as the County is not part of the federal government; and (2) as the County's legislative authority, the Board of County Commissioners, adopted the legislation, there can be no separation of powers issue?

4.2 Did the superior court err in not dismissing FOCG's equal protection claim where legislation is upheld unless arbitrary or irrational, and the County's legislation was adopted to address legitimate land use planning objectives, as set forth in unchallenged findings of fact?

4.3 Did the superior court err in not dismissing FOCG's due process claim where: (1) FOCG failed to identify an

interest the due process clause protects; and (2) FOCG suffered no due process infringement?

5. Did the superior court err in not dismissing FOCG's claim of improper delegation pursuant to Ch. 36.70 RCW, and granting FOCG summary judgment, where the statute provides for the Board of County Commissioners to make the final decision on legislative actions, which is exactly what the Board did?
6. Did the superior court err in granting FOCG summary judgment on its Comprehensive Plan consistency claim, where the County has wide discretion in implementing its Plan and the County action is consistent with the general, non-mandatory Plan policies FOCG identified?

#### **4. STATEMENT OF THE CASE**

##### **4.1. Planning for Growth**

In the Husum BZ Corner Planning Area, Klickitat County adopted rezone legislation to address impacts from the next twenty years of growth. As set forth in unchallenged findings, the County encouraged growth to locate where development is already occurring and where it is best served by public services and infrastructure.<sup>27</sup> The two areas rezoned are known locally as BZ Corner and Husum. The County's goal was to encourage growth within Husum and BZ Corner, "an area which has seen greater concentration of growth, grading, and land division than the surrounding Resource lands and Forest Resource areas." As examples,

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<sup>27</sup> AR 3 and 4 (Ordinance, Findings B-2 and D-1); AR 948, 954 (Examiner Decision, Findings 2.1.3, 2.1.4, 2.4.1).

“the Fruit Home Colony subdivision is located in Husum, as is a golf course.”<sup>28</sup> The Examiner found this is where:

- Public waste and water systems can be developed more cost effectively;
- Services can be delivered more economically; and
- There are less concerns about catastrophic wildfires in difficult to access areas.<sup>29</sup>

In short, the legislation focuses a modest level of development within a more developed portion of the Planning Area.<sup>30</sup> In BZ, 220 acres were rezoned from Resource Lands (one unit per 1/4 acre - 20 acres, depending on development suitability), to RR2 (one unit per two acres).<sup>31</sup> In Husum:

- Densities proximate to two key White Salmon River tributaries are decreased. 258 acres were rezoned from Rural Center (one unit per 5,000 square feet)<sup>32</sup> to RR1 (one residence per one acre);
- 197 acres were rezoned from Resource Lands (one unit per 1/4 acre - 20 acres) to RR1 (one unit per one acre); and,
- 645 acres were rezoned from Resource Lands (one unit per 1/4 acre - 20 acres) to RR2 (one unit per two acres).<sup>33</sup>

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<sup>28</sup> AR 954 (Examiner's Decision, Finding 2.4.1).

<sup>29</sup> AR 954 (Examiner Decision, Finding 2.4.1).

<sup>30</sup> AR 200003 (SEPA Ex. 1, Addendum), p. 3; AR 210766-67 (SEPA Ex. 30, aerial photographs).

<sup>31</sup> AR 5 (Ordinance, Finding D-9); AR 953 (Examiner Decision, Finding 2.3.7).

<sup>32</sup> See AR 215511 (SEPA Ex. 148, Shorelines Report, p. 45) (“Rural Center has the most structures per acre, which is consistent with the County zoning. That is to say, more structures exist where zoning allows for higher density ....”), and AR 215522, p. 56 (“In shoreline areas, most development (40% in 2002) exists in Rural Center zoned areas....”).

<sup>33</sup> AR 5 (Ordinance, Finding D-9); AR 953 (Examiner Decision, Finding 2.3.8).

In this last area, within the White Salmon River Management Plan Area, a name based on the River's federal, non-regulatory Wild & Scenic River designation, an overlay applies the RR2 zone and doubles River setbacks. The County adopted the overlay on a pilot basis. Following a limited period for vesting, it sunset in 2012.<sup>34</sup>

In addition to reducing densities at the tributaries and increasing River setbacks, the rezone provides greater certainty as to ultimate build out. While FOCG prefers the prior Resource Lands zoning, within that zone, minimum lot sizes can drop well below one unit per two acres to 1/4 acre.<sup>35</sup> This pre-existing zoning does not permanently "fix" densities on any particular property. Densities can increase over time through a density evaluation process, which is based on development suitability. Previously, a new density determination could be issued without notice every five years on the same property.<sup>36</sup> With the new legislation, density determinations are subject to public notice, multiple determinations on the same property must preserve at least equivalent land for natural resource

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<sup>34</sup> AR 47-48 (KCC 19.54A.010, .020).

<sup>35</sup> AR 215922 (SEPA Ex. 151, KCC 2.26:8: "The maximum number of dwelling units per acre shall be four (4) except when otherwise approved by the Board of Adjustment for multi-family residential use."); AR 215923 (SEPA Ex. 151, KCC 2.26:8, density assignments ranging from four dwelling units per acre to one per 20 acres).

<sup>36</sup> AR 215924 (SEPA Ex. 151, KCC 2.26:13).



use, and the determinations expire after five years.<sup>37</sup> The prior regulations were a concern as the rezoned area is generally suitable for development, creating great uncertainty as to ultimate build out patterns.<sup>38</sup>

#### **4.2. 259 Additional Residences Over 20 Years**

The legislation plans for 259 additional residences over 20 years.<sup>39</sup> FOCG did not challenge the County's land capacity analysis during the SEPA hearing. The Examiner found:

In reviewing the total residential development likely to be built with the rezone, the Klickitat County Planning Department completed a "parcel-by-parcel" land capacity analysis, which considered development constraints on a site-specific basis. The analysis is summarized in Table 1a below. The analysis calculated expected long-term capacity for residential growth resulting from the Proposal. ... The County's analysis was addressed in the Record, briefing, and testimony. Friends did not contest the analysis.

During closing argument, in response to questioning from the Examiner, Friends indicated they did not know whether the analysis was correct or not.<sup>40</sup>

Growth will occur regardless of the rezone. The question is whether or not it will locate in a planned fashion.<sup>41</sup> The County chose to plan, and

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<sup>37</sup> AR 44 (KCC 19.53.050(B); AR 47 (KCC 19.53.120); AR 47 (KCC 19.53.110).

<sup>38</sup> AR 199 (Fact Sheet); AR 209873, 9874, 9898 (SEPA Ex. 11, Staff Report); AR 819, color version at CP 1205 (chart of building permits issued 2006-11); AR 200012 (Addendum, Map of water service areas); AR 948 and 954 (Examiner Decision, Findings 2.1.4, 2.1.5, 2.4.1, 2.4.2).

<sup>39</sup> AR 210983 (SEPA Ex. 44, Staff Memo), *see* underlying data at AR 210628-646 (SEPA Ex. 22); AR 951-953 (Examiner Decision), Findings 2.3.6 and 2.3.10; *see also* FN 2 above.

<sup>40</sup> AR 951-953 (Examiner Decision), Findings 2.3.6 and 2.3.10.

development has proceeded at a slower pace than predicted. At the time of the superior court's decision, not one new lot had been created.<sup>42</sup>

#### **4.3. Resolution: Additional Mitigation, Although not Required**

In addition to the rezone Ordinance, the County adopted Resolution 08612. The Resolution: (1) outlines a land banking program; (2) sets forth mitigation ratios for preserving land for natural resource use; and (3) outlines an approach to mitigation for future rezones in a portion of the Planning Area.<sup>43</sup> There is no impermissible delegation. As the Resolution explains, the banking program requires further development, and any future rezone requires Board of County Commissioner approval.<sup>44</sup> FOCG conceded the Resolution may be constitutionally implemented; it just did not know if it would be.<sup>45</sup> FOCG even invited the superior court to "dismiss the unlawful delegation claim."<sup>46</sup> The superior court erred in not doing so.

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<sup>41</sup> AR 60 (Q&A Sheet).

<sup>42</sup> CP 1444-45 (At the time of the superior court's decision, three short plats, with a potential for five new lots had been submitted, but final approvals had not issued.)

<sup>43</sup> AR 53-57 (Resolution).

<sup>44</sup> AR 55 (Resolution), FN 1 ("This approach [mitigation associated with rezone] cannot be utilized without County Commissioner approval."); AR 57 (The Board shall further review the banking approach).

<sup>45</sup> TR (February 28, 2013 Summary Judgment Hearing), pg. 76:3-8.

<sup>46</sup> TR (February 28, 2013 Summary Judgment Hearing), pg. 76:4-5.

#### 4.4. Exhaustive Analysis of Water Resources

The County Commissioners heard an initial appeal on the initial 2008 DNS, and remanded for further analysis.<sup>47</sup> On remand, the County Planning Department commissioned professional hydrologists to prepare a water resource analysis. The analysis was prepared for SEPA purposes, meaning it was conservative, assessed a worst-case scenario, and was based on a full range of alternatives.<sup>48</sup> As such, the analysis was not limited to the modest and predictable increase of 259 residences over 20 years. Rather, it assessed impacts associated with as many as 3,861 homes, which exceeds projected growth for the entire County by 2030.<sup>49</sup>

Yet, even at these high levels, the analysis concluded impacts could be mitigated.<sup>50</sup> Certainly, 259 homes lacks significance. The County's expert witnesses confirmed in testimony before the Examiner that water resource impacts would not be significant.<sup>51</sup> In fact, maintaining existing zoning may lead to greater water use impacts, given the uncertainty on densities for properties developed through the Resource

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<sup>47</sup> AR 209854-56 (SEPA Ex. 9, Resolution 11908).

<sup>48</sup> CP 550-551 (TR, SEPA Hearing, September 19, 2011, pgs. 218-219).

<sup>49</sup> AR 200079 (SEPA Ex. 2, Hydrologic Report, Alternative 1a), Table 1.2; AR 210986 (SEPA Ex. 44, State Office of Financial Mgmt. projection of 2,514 additional persons from 2010-2030, or 1,070 residences, at 2.35 persons per residence); AR 210984 (estimated persons per residence in the Planning Area); *see also* AR 200079.

<sup>50</sup> AR 200037-40 (Hydrologic Report, pgs. 4-7).

<sup>51</sup> CP 546:20-24 (TR, SEPA Hearing, December 19, 2011, pg. 214:20-24); *see also* AR 964 (Examiner Decision), Findings 2.6.5.1-2.6.5.4.

Lands zoning and the high density Rural Center acreage proximate to two key White Salmon River tributaries. By reducing densities there, consistent with the hydrologists' recommended mitigation,<sup>52</sup> the rezone reduces the potential for well location in continuity with these tributaries.

#### **4.5. Extensive Agency Consultation**

The County consulted with state and local agencies throughout its review. Following the remand of the first DNS, the County sought additional agency comment. Due to proposal revisions and a better understanding of local requirements, the State Departments of Ecology, Fish & Wildlife, and Transportation, submitted supportive comment.

We anticipate that as the Husum/BZ Corner Sub-Area builds out, the County will confirm water availability during building permit, subdivision, and/or SEPA review stages. In confirming water availability, there is opportunity to consult with Ecology to confirm water can be supplied consistent with both protecting the water resource for other users and the natural environment. In evaluating the Addendum it appears that Klickitat County has provided information to address questions from the Water Resources Program that were included in the November 5, 2010 SEPA comments from Ecology.<sup>53</sup>

We understand that the re-zoning plan does not authorize any specific development or constitute any land use approval for a specific piece of property, and that any proposed land use development or project in the planning area must undergo the applicable project permit review and

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<sup>52</sup> AR 200035 (SEPA Ex. 2, Hydrologic Report), p. 2.

<sup>53</sup> AR 210772-73 (SEPA Ex. 31, Ecology comment, December 8, 2011), *see also* AR 210774 (Ecology October 26, 2011 comment).

approval process required by the Zoning Code (including critical areas ordinance, SEPA, and SMP) and consistent with the Comprehensive Plan. However, this plan will set the regional framework for the parcel-by-parcel review to follow. While it is reassuring that project permit review will still be required, this plan represents a valuable opportunity to facilitate landscape-level conservation of upland wildlife habitats at a more regional scope.<sup>54</sup>

This level of agency consultation and technical review is not typical for a land use proposal resulting in only 259 new residences over twenty years, which reduces rather than increases impacts.

#### **4.6. SEPA Review: MDNS, Addendum, and Four EIS's**

The County's SEPA review included an MDNS, Addendum, and four EIS's.<sup>55</sup> The White Salmon River EIS directly addresses impacts from development in the exact same area rezoned.<sup>56</sup> The other EIS's provide updated analysis on ecological resources and development conditions.<sup>57</sup> Even if impacts from 259 additional residences over twenty years is viewed as significant, and not mitigated, impacts were disclosed by EIS. SEPA requires nothing further.

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<sup>54</sup> AR 210769 (SEPA Ex. 31, WDFW Comment, December 5, 2011); *see also* AR 210771 (WDFW October 25, 2011 comment).

<sup>55</sup> AR 4-5 (Addendum, procedural summary); AR 200001-26 (SEPA Ex. 1, Addendum); AR 200027-107 (SEPA Ex. 2, Hydrologic Report); AR 200108-124 (SEPA Ex. 3, MDNS); AR 200125-496 (SEPA Ex. 4, White Salmon River EIS); AR 200497-202119 (SEPA Ex. 4, Condit Dam EIS documents); AR 202120-208548 (SEPA Ex. 5, Whistling Ridge EIS); AR 208659-209852 (SEPA Ex. 7, Sundoon EIS).

<sup>56</sup> AR 200128-142 (White Salmon River EIS, summarizes results of EIS analysis); AR 200491-6 (White Salmon River EIS, maps showing area studied).

<sup>57</sup> AR 4-5 (Addendum, describes incorporated EIS's); AR 109-10 (MDNS, describes incorporated documents).

#### **4.7. FOCG's Appeal**

FOCG appealed the Ordinance and Resolution, and the Hearing Examiner's SEPA decision, to superior court. The County moved for summary judgment on FOCG's constitutional, Ch. 36.70 RCW, and spot zoning claims.<sup>58</sup> FOCG filed a cross motion for summary judgment on its SEPA, Comprehensive Plan consistency, and spot rezone claims.<sup>59</sup> The superior court denied the County's motion and granted FOCG's. In its ruling, the superior court failed to address the constitutional claims, failed to defer to County legislative decisions and SEPA review, and failed to treat the unchallenged findings as verities. After the superior court entered a CR 54(b) order,<sup>60</sup> the County appealed to this Court.<sup>61</sup>

### **5. ARGUMENT**

#### **5.1. Standard of Review**

FOCG's SEPA claims were raised through a constitutional writ of certiorari. Its spot rezone, constitutional, and Ch. 36.70 RCW claims were raised by declaratory judgment, Ch. 7.24 RCW.<sup>62</sup> The standard of review is highly deferential, with FOCG having the burden of proof.

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<sup>58</sup> CP 942, 943 (County's Summary Judgment Motion, pgs. i-ii).

<sup>59</sup> CP 1215, 1275-76 (FOCG's Summary Judgment Motion, pgs. i, 53-54).

<sup>60</sup> CP 1536-42.

<sup>61</sup> CP 1543-52.

<sup>62</sup> See CP 1265-66 (FOCG's Summary Judgment Motion, pgs. 43-44, addressing constitutional writ of certiorari); CP 1270-71 (FOCG's Summary Judgment Motion, pgs. 48-49, addressing declaratory judgment).

### **5.1.1. Constitutionality is Presumed**

"Municipal ordinances are presumed to be constitutional," and FOCG "bears the burden of showing the invalidity of an enactment beyond a reasonable doubt."<sup>63</sup> Further, a facial challenge is rejected unless "there are no factual circumstances under which the ordinance could be constitutional."<sup>64</sup> As FOCG conceded the Resolution could be implemented constitutionally, dismissal was required, and FOCG invited the superior court to do so. The superior court's failure to, was error.<sup>65</sup>

### **5.1.2. Unless Arbitrary, Legislative Action is Upheld**

In a constitutional writ appeal, "courts must afford great deference to legislative actions to prevent substitution of judicial judgment for the decisions of elected officials and to preserve the separation of powers."<sup>66</sup>

In approaching this issue, it is essential to bear in mind that zoning is a discretionary exercise of police power by a legislative authority. Courts will not review, except for manifest abuse, the exercise of legislative discretion. Manifest abuse of discretion involves arbitrary and capricious conduct. Such conduct is defined to be without consideration and in disregard of the facts. One who asserts that a public authority has abused its discretion and is guilty of arbitrary, capricious, and unreasoning conduct has the burden of proof. If the validity of the legislative authority's classification for zoning purposes is fairly debatable, it will be sustained.<sup>67</sup>

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<sup>63</sup> *Seattle v. State*, 100 Wn.2d 232, 238, 668 P.2d 1266 (1983).

<sup>64</sup> *City of Pasco v. Shaw*, 161 Wn.2d 450, 458, 166 P.3d 1157 (2007).

<sup>65</sup> TR (Summary Judgment Hearing, February 28, 2013), pg. 76:3-8.

<sup>66</sup> *Leavitt v. Jefferson County*, 74 Wn. App. 668, 674, 875 P.2d 681(1994).

<sup>67</sup> *Carlson v. Bellevue*, 73 Wn.2d 41, 45, 435 P.2d 957 (1968), internal cites omitted, citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 Sup. Ct. 114 (1926).

This court uses the same deferential standard for the declaratory action.<sup>68</sup>

Absent arbitrary and capricious action, legislation is affirmed.

### 5.1.3. SEPA's Deferential Review Standard

SEPA review is highly deferential. Under SEPA, "the decision of the governmental agency shall be accorded substantial weight."<sup>69</sup> An MDNS is upheld unless clearly erroneous:

A decision is clearly erroneous when the court is left with the definite and firm conviction that a mistake has been committed. We do not substitute our judgment for that of the decision-making body, but we examine the record in light of public policy contained in the legislation authorizing the decision. An agency's decision to issue a mitigated DNS and not to require an EIS is accorded substantial weight.<sup>70</sup>

In a dispute over scientific methodology, the court defers to the agency. "When an agency is presented with conflicting expert opinion on an issue, it is the agency's job, and not the job of the reviewing appellate body, to resolve those differences."<sup>71</sup> Particularly in the zoning context, the Supreme Court has emphasized the highly deferential nature of the "clear error" review standard.<sup>72</sup>

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<sup>68</sup> *Freeman v. State*, 178 Wn.2d 387, 399, 404, 309 P.3d 437 (2013).

<sup>69</sup> RCW 43.21C.090.

<sup>70</sup> *Moss v. City of Bellingham*, 109 Wn. App. 6, 13-14, 31 P.3d 703 (2001) (MDNS upheld for 172 lot subdivision with ridges, swales, and creeks); *Thornton Creek Legal Defense Fund v. Seattle*, 113 Wn. App. 34, 57-58, 52 P.3d 522 (2002).

<sup>71</sup> *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 28, 988 P.2d 27 (1999); *City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1507 (D.C. Cir. 1994) (agency deferred to in selection of noise measurement methodology); *Seattle Community Council Federation v. Federal Aviation Administration*, 961 F.2d 829, 833-34 (9th Cir. 1992).

<sup>72</sup> *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 829-30, 256 P.3d 1150 (2011) (in a non-SEPA case, but one involving "clear error" review standard, court emphasized discretion afforded the city in a site specific zoning decision).



#### **5.1.4. Unchallenged Findings are Verities on Appeal**

Unchallenged findings of fact are verities on appeal. This applies to findings of fact in county land use ordinances<sup>73</sup> as well as to findings of hearing examiners.<sup>74</sup> For example, in *Oyster Growers Association v. Moby Dick Corp.*,<sup>75</sup> a rezone was challenged, in part, as spot zoning. As petitioners did “not challenge these findings, they are verities before [the] court.”<sup>76</sup> Similarly, in *City of Medina v. T-Mobile USA*,<sup>77</sup> where appellant did not “challenge any of the hearing examiner's findings ... they are verities on appeal.”<sup>78</sup> Given this well established law, the County legislation and Hearing Examiner Decision findings are accepted as true.

#### **5.2. SEPA Issues**

##### **5.2.1. FOCG Failed to Meet its Burden to Demonstrate Probable, Significant Adverse Impacts**

The rezone did not create greater impacts than those under the old zoning.

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<sup>73</sup> *Manke Lumber Co. v. Hearings Board*, 113 Wn. App. 615, 628, 53 P.3d 1011 (2002) (unchallenged findings of fact contained in planning ordinance are verities on appeal).

<sup>74</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 307 fn. 9, 936 P.2d 432 (1997) (examiner's findings of fact were verities where no errors were assigned to findings).

<sup>75</sup> *Oyster Growers Association v. Moby Dick Corp.*, 115 Wn. App. 417, 432-433, 62 P.3d 912 (2003).

<sup>76</sup> *Id.* at 432; see also *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 688, 26 P.3d 943 (2001) (city council findings were verities on challenge to required mitigation).

<sup>77</sup> *City of Medina v. T-Mobile USA*, 123 Wn. App. 19, 95 P.3d 377 (2004).

<sup>78</sup> *Id.* at 29; see also *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 347 n. 6, 75 P.3d 1003 (2003).

The cases involving rezones indicate that resolution of the environmental significance issue depends upon the extent to which the change in zoning classification will allow substantial intensification of use and whether there is a specific development proposal at the time of the rezone application. **Where there is no significant difference in potential for environmental harm between uses permitted by existing and proposed zoning classifications, the rezone itself is not considered an environmentally significant event.**<sup>79</sup>

The County is planning for an additional 259 residences over a 20-year planning period which will be built regardless of County action.<sup>80</sup> The rezone is not an upzone. The County chose predictable densities instead of a confusing mix of 1/4 acre to 20 acre lots; densities proximate to key tributaries were reduced; and setbacks along the White Salmon River were increased. As established in unchallenged Examiner findings,<sup>81</sup> this does not “substantially intensify” impacts. Having failed to challenge these findings as a matter of law, FOCG failed to establish significance, and the superior court erred by requiring a new EIS.

Further, even if FOCG had met its burden to demonstrate the presence of a probable, significant adverse impact, the impacts are mitigated, as set forth in unchallenged findings. The Examiner considered the regulatory structure, which protects wildlife from significant impacts,

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<sup>79</sup> The Washington State Environmental Policy Act, A Legal and Policy Analysis, Richard L. Settle, Lexis Nexis (2012), § 13.01, pg. 13-11, emphasis added.

<sup>80</sup> FN 2 above; AR 210986 (SEPA Ex. 44, state’s population projections); AR 60 (Q&A Sheet).

<sup>81</sup> AR 947-978 (findings throughout address lack of significant impacts), see specifically Findings 2.1.5, 2.4.1-2.5.4, as well as findings addressing water resources in section 2.6, wildlife at 2.7, and Wild & Scenic River Management Plan at 2.9.

requires riparian setbacks, establishes minimum septic system requirements approved by the County and state, and requires potable water supply confirmation.<sup>82</sup> As FOCG failed to establish an increase in impacts with probable significance, the superior court erred in requiring EIS preparation.

#### **5.2.2. FOCG Failed to Meet its Burden to Demonstrate Impacts Were Not Addressed by EIS**

Even if FOCG had been able to establish unmitigated, significant impacts, FOCG failed to demonstrate that the County's four incorporated EIS's, including particularly the White Salmon River EIS, did not disclose impacts flowing from residential development. SEPA encourages the County's approach. "Agencies **should** use existing studies and incorporate material by reference whenever appropriate."<sup>83</sup> Although FOCG failed to demonstrate probable significance in each of the issues FOCG raised in superior court, these four EIS's nonetheless addressed any impact, thus eliminating the requirement for a new EIS.

The White Salmon River EIS in particular addresses impacts from residential growth. The EIS evaluates a full range of alternatives, including ones with considerably more residential build-out than the

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<sup>82</sup> AR 210979-981 (SEPA Ex 43, County Memo - Planning History); AR 210281-309, Ex. 14 (Critical Areas Ordinance); AR 210998-211034, SEPA Ex. 46 (County Health Dept. regulations); AR 211036-211093 (SEPA Ex. 46, County plat requirements); AR 211095-211156 (SEPA Ex. 46, County road construction requirements).

<sup>83</sup> WAC 197-11-635, emphasis added; WAC 197-11-754 ("Incorporation by reference" means the inclusion of all or part of any existing document in an agency's environmental documentation by reference.")

legislations enables,<sup>84</sup> which is fully mitigated with the proposal. Simply because the EIS was issued in 1991 does not prohibit incorporation or somehow automatically create reversible error, as FOCG asserted.<sup>85</sup> And FOCG's bald assertion that the development evaluated in the EIS was not similar enough to the planned for development to warrant incorporation is without support.<sup>86</sup> The EIS evaluated impacts from residential development. That is what the County is planning for. Further, if anything, as the regulatory structure is more rigorous than when the EIS was issued, the EIS overstates impacts from growth.<sup>87</sup> As SEPA encourages incorporation, and the EIS assesses the type of development the County is planning for, the County's incorporation of the EIS was consistent with SEPA.

### **5.2.3. Fish: No Probable, Significant Adverse Impacts**

The County's rezone does not significantly impact fish habitat. FOCG conceded before the Examiner that there is no probable, significant adverse impact on White Salmon River flow levels.<sup>88</sup> Even with far

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<sup>84</sup> The EIS evaluates impacts from 2,864 houses in Husum and 672 in BZ Corner, along with additional development in the area. AR 200359 (SEPA Ex.4, White Salmon EIS), pg. IV-46, *see also* AR 200139-141 (pgs. S-9 - S-11) (summary of analysis).

<sup>85</sup> CP 1287 (FOCG's Summary Judgment Motion), pg. 65:7-14.

<sup>86</sup> CP 1287 (FOCG's Summary Judgment Motion), pg. 65:9-10.

<sup>87</sup> AR 210979-981 (SEPA Ex 43, County Memo - Planning History); AR 210281-309, Ex. 14 (Critical Areas Ordinance); AR 210998-211034, SEPA Ex. 46 (County Health Dept. regulations); AR 211036-211093 (SEPA Ex. 46, County plat requirements); AR 211095-211156 (SEPA Ex. 46, County road construction requirements).

<sup>88</sup> CP 746-47 (TR, SEPA Hearing, January 23, 2012, pgs. 17-18 ("So with respect to the main stem of the White Salmon, neither Mr. Yinger nor my clients have claimed that the well drilling and water withdrawals are going to significantly reduce the flows in the main stem of the White Salmon River."); *see also* AR 962 (Examiner Decision, Findings 2.6.3.1 - 2.6.3.3).

greater development than with the County's proposal, River base flow reduction is not even measurable.<sup>89</sup> By reducing allowable densities at Rattlesnake and Indian Creeks, the rezone reduces the potential for wells to locate in areas "in continuity" with these tributaries,"<sup>90</sup> consistent with expert witness testimony during the administrative hearing:

**Q Do you see the impacts on the tributaries as significant from the proposal?**

**A No, not under the full buildout conditions or under the parcel by parcel because of the – with the reduction in zoning.<sup>91</sup>**

The County expert's original analysis assessed impacts from not 259 additional residences, but as many as 3,861, and while identifying a potential for tributary impacts at that higher development level, determined they could be mitigated.<sup>92</sup> County SEPA review incorporates mitigation by reducing both densities and total build-out.

In contrast, FOCG's witness failed to base his assessment on a 259 residence build-out over a 20-year planning period.<sup>93</sup> And, FOCG failed

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<sup>89</sup> CP 545:5-22 (TR, SEPA Hearing, December 19, 2011), pg. 213:5-22; AR 216220-221 (SEPA Ex. 176, Aquifer Test Reports, pgs. 10-11) (FOCG's witness viewed such withdrawals as "negligible," in other work he had completed).

<sup>90</sup> AR 200035 (SEPA Ex. 2, Hydrologic Report, p. 2, 2nd para.)

<sup>91</sup> CP 546:20-24 (TR, SEPA Hearing, December 19, 2011, pg. 214:20-24, emphasis added). The County's report and testimony addressed stream flow, and potential impacts to water quality (storm water pollutants and temperature).

<sup>92</sup> AR 200038 (Ex. 2, Hydrologic Report, pg. 5); AR 200065 (Ex. 2, Hydrologic Report, pg. 32); *see also* CP 550-51 (SEPA Hearing, December 19, 2011, pgs. 218-19) (original analysis based on full build out, which is not realistic).

<sup>93</sup> CP 473:3-7 (TR, SEPA Hearing, December 19, 2011, pg. 141:3-7) (impact assessment based on "full buildout"), and CP 453:18 (pg. 121:18) (based on "a significant buildout").

to identify how the rezone would significantly impact a specific fish species, even identifying an invasive species as one needing protection.<sup>94</sup> Further, FOCG failed to address the Critical Areas Ordinance, which requires tributary setbacks and other mitigation.<sup>95</sup> And, finally, FOCG failed to challenge the Examiner's findings of no significant impacts on river and tributaries, which are now verities.<sup>96</sup>

But, even if impacts were significant, impacts are disclosed by EIS. The Condit SEPA review addresses current fisheries resources,<sup>97</sup> and the White Salmon EIS addresses impacts from residential development on fish habitat.<sup>98</sup> The County not only incorporated the EIS documents prepared for the dam removal, located downstream, but also addressed dam removal in its analysis.<sup>99</sup> In short, the EIS disclosed impacts, and the rezone legislation mitigates impacts, as the unchallenged findings from the Examiner set forth.

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<sup>94</sup> TR (February 28, 2013 Summary Judgment Hearing), pg. 106:7-16.

<sup>95</sup> AR 210302-305 (SEPA Ex. 14, Critical Areas Ordinance).

<sup>96</sup> AR 962-965 (Examiner Decision), Findings 2.6.3.1- 2.6.3.3 (River flows), Findings 2.6.5.1 - 2.6.5.5 (tributary impacts), and Findings 2.6.7.1 - 2.6.7.3 (White Salmon River EIS addresses impacts). The findings address water quantity and quality.

<sup>97</sup> See e.g., AR 202065-66, 201607-616 (SEPA Ex. 5, Condit EIS documents).

<sup>98</sup> AR 200314-321 (SEPA Ex. 4, White Salmon EIS), pgs. IV-1 – IV-8; see also AR 200139-141 (SEPA Ex. 4, White Salmon EIS), pgs. S-9 – S-11.

<sup>99</sup> AR 200052 (Hydrologic Analysis, pg. 19; AR 200497-202119 (SEPA Ex. 5, Condit Dam NEPA/SEPAEIS documents).

#### **5.2.4. Aquifers: No Probable, Significant Adverse Impacts**

Even at build-out levels well beyond the 259 additional residences, aquifer impacts are not significant.<sup>100</sup> This is set forth in unchallenged findings, which are supported by the County expert's responses to the Hearing Examiner's extensive questioning.<sup>101</sup>

Although the area rezoned was purposefully located proximate to the two largest water suppliers in the area,<sup>102</sup> and the largest system recently expanded its water rights,<sup>103</sup> the increased hook up availability simply provides mitigation, and certainly did not alter the non-significance assessment.<sup>104</sup> Also, before the Examiner, FOCG exhaustively argued that shallow and deep aquifers are inter-connected, meaning the shallow aquifer would have continual recharge to the deep aquifer from precipitation.<sup>105</sup> FOCG thought this would increase impacts; it is the

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<sup>100</sup> FOCG's issue in superior court addressed water resource mitigation. CP 1275 (FOCG's Summary Judgment Motion), pg. 53:13-15. FOCG's argument focused on aquifer impacts. CP 1282-85 (FOCG's Summary Judgment Motion), pgs. 60-63.

<sup>101</sup> CP 558-64 (TR, December 19, 2011, pgs. 226-231); CP 962-3 (Examiner's Decision, Findings 2.6.3.2-.3, 2.6.4.1-.4.

<sup>102</sup> AR 200012 (SEPA Ex. 2, Addendum, map of water service territory); *see* explanation at AR 200006.

<sup>103</sup> CP 547 (TR, SEPA Hearing, December 19, 2011, pg. 215:18-19; City has "now enlarged their water right"); *see also* CP 700-1 (TR, SEPA Hearing, December 20, 2011, pgs. 364-365. Testimony on Health Dept. consultation re: Fordyce well availability).

<sup>104</sup> AR 200052 (SEPA Ex. 2, Hydrologic Report, p. 19) (maximum of 37 hook-ups available; of 125 approved connections, 88 are in use); AR 550-551 (TR, SEPA Hearing, December 19, 2011, pgs. 218-19) (analysis conservative and based on improbably high growth scenarios).

<sup>105</sup> *See e.g.*, CP 1089 (FOCG's reply brief at the SEPA hearing).

reverse. Continual recharge reduces impacts, as it mitigates any deep aquifer withdrawals.<sup>106</sup> Finally, the limited water withdrawal with the rezone, which is likely less than maintaining the preexisting zoning, is mitigated through both local code and state law<sup>107</sup> which require water supply adequacy to be confirmed during project permit review, as Ecology noted in comment.<sup>108</sup> FOCG failed to demonstrate clear error.

#### **5.2.5. Wildlife: No Probable, Significant Adverse Impacts**

FOCG failed to identify wildlife of concern other than by passing reference, and did not identify the biological components required for that wildlife which the County's proposal impacts. This would be difficult, given the limited development (259 residences over twenty years) being planned for so as to reduce, rather than increase impacts.<sup>109</sup>

Further, wildlife impacts are mitigated through the Critical Areas Ordinance, which the County adopted through a settlement with Washington's Departments of Fish and Wildlife, Ecology, and Commerce.<sup>110</sup> It protects fish and wildlife habitat conservation areas.<sup>111</sup> It

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<sup>106</sup> CP 617-19, 636:4-8 (TR, SEPA Hearing, December 20, 2011, pgs. 281-283, and pg. 300:4-8 ("It wouldn't be significant or measurable because of the abundant recharge area that exists for the upper aquifer.")).

<sup>107</sup> RCW 19.27.097 and RCW 58.17.110(2) (evidence of potable water supply required); AR 211053, AR 211067-68, and generally, 211036-211093 (SEPA Ex. 46, County plat requirements).

<sup>108</sup> AR 210772-773 (SEPA Ex. 31, Ecology Cmt., December 8, 2011), *see also* October 26 comment at AR 210774).

<sup>109</sup> FN's 2, 4, and 5, above.

<sup>110</sup> AR 210281 (SEPA Ex. 14, Critical Areas Ordinance).

<sup>111</sup> AR 210296 (SEPA Ex. 14, Critical Areas Ordinance).



requires analysis, setback delineations, and other performance measures. Development must **"avoid probable, significant adverse impacts to the conservation area and to protect the functions and values of the conservation area...."**<sup>112</sup> The unchallenged Examiner findings state:

In its reply briefing, Friends did not specifically identify the sensitive wildlife species that would be harmed by the Proposal, referring instead in very general terms to "wildlife habitat" impacts. Friends also did not address the County's Critical Areas Ordinance in any detail. ... It includes requirements for analysis, setback delineations, and other performance measures. "Activities may be permitted within a conservation area subject to conditions designed to avoid probable, significant adverse impacts to the conservation area and to protect the functions and values of the conservation area...."

The Critical Areas Ordinance requires a number of measures to address impacts, including a habitat mitigation plan for protected wildlife species, which WDFW is typically consulted on. ....

WDFW also noted that the Proposal may actually better protect wildlife than existing conditions. Friends' witness indicated that the County's approach to mitigation was the type of comprehensive mitigation identified in his testimony for addressing wildlife impacts.

Wildlife impacts associated with residential development have been assessed in the White Salmon EIS. This EIS assesses wildlife habitat in the area. The EIS assesses habitat impacts based on six development alternatives. . . . The EIS likely overstates impacts, as it predates regulations

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<sup>112</sup> AR 210304 (SEPA Ex. 14, Critical Areas Ordinance), emphasis added.

promulgated after its issuance, including the County's Critical Areas Ordinance.<sup>113</sup>

But, even if the rezone increased impacts, and those impacts were not mitigated, impacts are disclosed in the EIS's, including the White Salmon River EIS.<sup>114</sup>

#### **5.2.6. Road Impacts: FOCG Never Raised the Issue and Thus Failed to Exhaust its Remedies**

The County considered impacts associated with road construction.<sup>115</sup> Indeed, the area rezoned is located along the major highway, Highway 141, to minimize the need for new construction.<sup>116</sup> But, having not raised the road issue before the Examiner, FOCG failed to exhaust its administrative remedies.<sup>117</sup> Moreover, as set forth in the Examiner's unchallenged findings, while it raised the issue of stormwater impacts, FOCG did not identify a single location proximate to the River or a tributary which will necessitate new road construction; and, failed to address the Critical Areas Ordinance, Ecology permitting, and other regulatory requirements, which provide mitigation.<sup>118</sup>

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<sup>113</sup> AR 966-968 (Examiner Decision), Findings 2.7.2-2.7.6; *see also* AR 210769-771 (SEPA Ex. 31, WDFW Comment, October 25 and December 5, 2011).

<sup>114</sup> CP 967-68 (Examiner Decision, Finding 2.7.6), *see* EIS alternatives summary on AR 200165-193 (pgs. II-11 - II-39), impacts summary at AR 200139-141 (pgs. S-9 - S-11), and individual sections, *e.g.*, AR 200212-200226 (III-11 - III-26), Plants and Animals. (The citations are from the White Salmon River EIS, SEPA Ex. 4.)

<sup>115</sup> Road impacts (storm water runoff) were modeled. AR 200046-48 (SEPA Ex. 2, Hydrologic Report, pgs. 13-15.)

<sup>116</sup> CP 4 (Ordinance, Finding D-1).

<sup>117</sup> *CLEAN v. City of Spokane*, 133 Wn.2d 455, 465, 947 P.2d 1169 (1997).

<sup>118</sup> AR 200022-24 (SEPA Ex. 1, Addendum, pgs. 22-24, summary of regulatory environment); AR 210281-309 (SEPA Ex. 14, Critical Areas Ordinance); AR 210998-211034, AR 211036-211093 (SEPA Ex. 46, County plat requirements); AR 211095-211156 (SEPA Ex. 46, County road construction requirements).

Friends did not identify specific areas where there would be significant impacts from stormwater on the environment, nor did they address how the County's standard mitigation; Critical Areas Ordinance; Shorelines Master Plan; added setbacks on the White Salmon River; reduction in development along Rattlesnake and Indian Creeks; and Ecology's stormwater permit requirements would not adequately address stormwater impacts.<sup>119</sup>

FOCG did not challenge these findings in superior court, instead citing to a document indicating, generally, that roads can impact salmonid habitat.<sup>120</sup> Neither County Public Works nor the State Department of Transportation had any concerns.<sup>121</sup> Nor did the State Dept. of Licensing, Geologist Licensing Board. FOCG's witness filed a complaint against the County's witnesses with the State Board, which raised storm water modeling as an issue.<sup>122</sup> The State Board found that the County expert's modeling approach was "likely more conservative" than the approach the FOCG consultant who filed the complaint recommended.<sup>123</sup> The Board found the case "without merit" and closed it.<sup>124</sup> Even if FOCG had exhausted administrative remedies, it did not meet its burden of proof.

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<sup>119</sup> AR 958 (Examiner Decision), Finding 2.6.1.6.

<sup>120</sup> CP 1281 (Friends' Summary Judgment Motion), pg. 59:13-20.

<sup>121</sup> AR 210777 (SEPA Ex. 31, State Dept. of Transportation comment, November 7, 2011); AR 210779 (SEPA Ex. 31, County Public Works comment, October 25, 2011).

<sup>122</sup> AR 509-535, AR 513.

<sup>123</sup> AR 942.

<sup>124</sup> AR 942-943.

### **5.2.7. County Committed to More Mitigation than SEPA Requires**

SEPA does not require that all mitigation be finalized up front.<sup>125</sup> The County Ordinance includes several mitigation measures, including the White Salmon River setback, mitigation to slow Resource Lands division, removal of 209 acres from the Proposal, and reducing densities along the Rattlesnake and Indian Creek tributaries.<sup>126</sup> The County regulatory structure also provides mitigation, (*i.e.*, Critical Areas Ordinance, Shoreline Master Program, subdivision regulations, stormwater regulations, health department water quality monitoring, etc.)<sup>127</sup> In addition, although not required, the County outlined mitigation through the Resolution.

The County's banking program, which the County committed to through the Resolution, will require further development. But, as the Examiner found, the mitigation is capable of being accomplished:

The Washington Department of Fish and Wildlife (WDFW) supports the Husum BZ Corner Sub-Area Plan amendment for the Focused Development and Resource Protection Project. The plan will be a useful planning tool

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<sup>125</sup> See *e.g.*, *West 514, Inc. v. Spokane County*, 53 Wn. App. 838, 848-49, 770 P.2d 1065 (1989) (county adoption of 1978 EIS on different project coupled with MDNS requiring future analysis was not clear error).

<sup>126</sup> See section 4.1 above; AR 200005 (SEPA Ex. 1, Addendum, pg. 5, 2nd para. and last para). Maps showing acreage removed are at AR 200010-11; AR 200042 (SEPA Ex. 2, Hydrologic Report, pg. 9 - property within Scenic Area originally included in the proposal); AR 47-48 (Ordinance, Ch. 19.54A); AR 6 (Ordinance, Findings E-3 -E-5).

<sup>127</sup> See AR 210979-981 (SEPA Ex 43, County Memo - Planning History); AR 210281-309 (SEPA Ex. 14, Critical Areas Ordinance); AR 210998-211034 (SEPA Ex. 46, County Health Dept. regulations); AR 211036-93 (SEPA Ex. 46, County plat requirements); AR 211095-156 (SEPA Ex. 46, County road construction requirements).

for focused development and conservation efforts in the White Salmon watershed.

The proposed habitat banking mechanism represents significant progress toward achieving a balance between habitat value and human population growth within the subarea... [T]his plan represents a valuable opportunity to facilitate landscape-level conservation of upland wildlife habitats at a more regional scale. ...

WDFW comment indicates such mitigation is feasible here, and would provide an approach for improving mitigation strategies on a "more regional scale." The County has outlined the steps to be taken in developing the Program; indicated it will continue to consult with relevant state agencies during program development; and has committed to the outlined mitigation.<sup>128</sup>

These findings are now verities on appeal. The County went to extraordinary effort to develop mitigation for not only this proposal, but to plan ahead to preserve its natural resource base. The fact that the banking approach will require further work is not the question. There is no SEPA requirement for mitigation to be finalized up front,<sup>129</sup> and FOCG failed to demonstrate the mitigation could not be accomplished. Moreover, without identifying a probable, significant adverse impact, FOCG failed to demonstrate that SEPA even required the mitigation. The superior court erred in granting FOCG summary judgment.

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<sup>128</sup> AR 955-56 (Examiner Decision), Findings 2.5.1, 2.5.2, and 2.5.4. The first two paragraphs are quotations from agency comment.

<sup>129</sup> See e.g., *West 514, Inc. v. Spokane County*, 53 Wn. App. 838, 848-49, 770 P.2d 1065 (1989) (county adoption of 1978 EIS on different project coupled with MDNS requiring future analysis was not clear error).

#### **5.2.8. FOCG Failed to Demonstrate the Rezone Would Significantly Exacerbate Impacts from a Separate, Dam Removal Proposal**

The County considered the removal of Condit Dam, located below Husum, in its SEPA Review. First, it incorporated the federal and state EIS documents developed for that proposal.<sup>130</sup> Second, the County's consultant considered the relationship between dam removal and the proposal. The County's hydrologist determined the rezone did not create significant issues when considered in conjunction with dam removal.<sup>131</sup> FOCG entirely failed to make a connection between 259 added lots over a twenty-year planning period and dam removal. The legislation does not provide for development within 200 feet of the River, it reduces impacts on tributaries, potable water availability is confirmed for any development,<sup>132</sup> and FOCG agreed impacts on River flows are negligible.<sup>133</sup> Again, FOCG failed to challenge the Examiner's findings:

The County considered Condit Dam's removal in its SEPA Review. In its Report, Aspect [professional hydrologists] described what it expected to occur with removal: ...

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<sup>130</sup> See section 4.6 above; see also CP 746-47 (TR, SEPA Hearing, January 23, 2012, pgs. 17-18, FOCG confirms well drilling will not significantly reduce main stem flows).

<sup>131</sup> AR 200052 (SEPA Ex. 2, Hydrologic Report, pg. 19) (dam removal "would potentially lower groundwater levels in the vicinity of Northwestern Lake creating a steeper groundwater gradient; removal of the dam is not anticipated to change the groundwater/surface water intersections.")

<sup>132</sup> RCW 19.27.097 and RCW 58.17.110(2) (evidence of potable water supply required); AR 211053, AR 211067-68, and generally, AR 211036-93 (SEPA Ex. 46, County plat requirements).

<sup>133</sup> See section 5.2.4 above.

The Condit Dam EIS, as supplemented, was incorporated into the County's SEPA review. Friends did not explain how Aspect's analysis, coupled with the actual Condit Dam EIS, failed to address impacts associated with dam removal, other than to note that the EIS did not address impacts from land development associated with the Proposal. However, the EIS did address impacts on water resources from dam removal. Thus, dam removal was accounted for in the County's analysis.<sup>134</sup>

The County incorporated the Condit Dam EIS documents, and prepared updated analysis. FOCG failed to meet its burden of proof to identify an unevaluated and unmitigated impact.

#### **5.2.9. SEPA Does Not Require Alternatives in an MDNS**

An MDNS need not include alternatives. FOCG conceded this issue under questioning by the Hearing Examiner:

Q Do you agree that, as a matter of law, when an MDNS is required, that there does not need to be consideration of -- or that consideration of alternatives are not legally required?

A That is correct, yes. I've never stated otherwise in any of my briefing.<sup>135</sup>

SEPA has general language providing for government to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."<sup>136</sup> But outside of an EIS, there is

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<sup>134</sup> AR 965 (Examiner Decision), Findings 2.6.6.1, 2.6.6.2.

<sup>135</sup> CP 828:11-16 (TR, SEPA Hearing, January 23, 2012, pg. 99:11-16).

<sup>136</sup> RCW 43.21C.030(2)(e).

no requirement to include alternatives. FOCG conceded the issue, consistent with the SEPA regulations, which do not require alternatives in the standard DNS form.<sup>137</sup> As a matter of law, the superior court erred in granting FOCG summary judgment.

Nonetheless, the County considered alternatives. The County considered reducing the scope of the rezone, removing 204 acres from the Scenic Area and 209 acres from along the White Salmon River.<sup>138</sup> The County considered increasing setbacks, and doubled setbacks along the White Salmon River.<sup>139</sup> The County considered mitigation its water resources consultant identified. The mitigation was either already in place or later adopted.<sup>140</sup> The County considered and committed to a variety of mitigation options.<sup>141</sup> The County considered and adopted additional cultural resource protections via settlement agreement.<sup>142</sup> And the White

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<sup>137</sup> WAC 197-11-970.

<sup>138</sup> AR 200005 (SEPA Ex. 1, Addendum), pg. 5, 2<sup>nd</sup> para. and last para; AR 200010-11 (maps showing acreage removed); AR 200042 (SEPA Ex. 2, Hydrologic Report), pg. 9 (property within Scenic Area originally included in the proposal).

<sup>139</sup> AR 47-48 (Ordinance), Ch. 19.54A; AR 6 (Ordinance), Findings E-3 - E-5.

<sup>140</sup> AR 20037-40 (SEPA Ex. 2, Hydrologic Report), pgs. 4-7 (identifies mitigation); AR 211000-34 (SEPA Ex. 46, Health Dept. Regulations); AR 210979-81 (SEPA Ex. 43); AR 210781 (SEPA Ex. 31, Health Dept. Memo addressing monitoring); CP 595-609 (TR, SEPA Hearing, December 19, 2011, pgs. 263-76, County Env. Health Dir. testimony); AR 7 (Ordinance), Finding E-9, addressing density reductions near tributaries; CP 547-48 (TR, SEPA Hearing, December 19, 2011, pgs. 215-216, testimony on City of White Salmon's five monitoring wells and expanded water rights); CP 634-36 (TR, SEPA Hearing, December 20, 2011, pgs. 634-35).

<sup>141</sup> See e.g., AR 3 (Ordinance), Finding C-3, cultural resource protections; AR 6 (Ordinance), Findings E-4, E-5, River protections; AR 7 (Ordinance), Finding E-9, tributary protections; AR 47-48 (Ordinance, addressing setback requirement); AR 53-57 (Resolution, committing to further mitigation).

<sup>142</sup> AR 855-862 (Ordinance O011712, adopting cultural resource protections); see also Addendum, AR 200019-20 (SEPA Ex. 1) and AR 210783-786 (SEPA Ex. 32).



Salmon River EIS included a full range of build out alternatives, which the County also considered.<sup>143</sup> Finally, the County debated whether to plan for growth or allow it to occur in a piecemeal fashion.<sup>144</sup> Thus, although not required in an MDNS, the County considered alternatives.

#### **5.2.10. FOCG Failed to Demonstrate a Federal Law Violation**

SEPA requires only that in assessing significance, the County consider whether “[a] proposal may to a significant degree ... [c]onflict with ... federal laws or requirements” protecting the environment.<sup>145</sup> The County considered federal law, and there is no conflict.

The federal designation of the White Salmon River as a “Wild & Scenic River” does not create a conflict with the County's rezone. The designation carries with it no regulatory requirements. The County nonetheless considered the designation and narrowed the proposal as a result. As the Examiner found, in unchallenged findings, the County pulled land from the proposal, and increased River setbacks.<sup>146</sup>

[The] County considered the Forest Service's Wild and Scenic River Management Plan ("Management Plan"). When the County incorporated the White Salmon EIS into the MDNS, it included the Management Plan. The Management Plan is addressed in the Addendum and MDNS, and the increased setbacks in Husum are based on

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<sup>143</sup> AR 200125-200496 (SEPA Ex. 4, White Salmon EIS), maps of alternatives attached to EIS at AR 200491-96, summary of alternatives at AR 200135-141 (pgs. S-5 – S-11).

<sup>144</sup> AR 60 (Q&A Sheet); AR 199 (Fact Sheet).

<sup>145</sup> WAC 197-11-330(3)(e)(iii).

<sup>146</sup> See AR 951, 955 (Examiner Decision), Findings 2.3.2 and 2.5.1; AR 200011 (SEPA Ex. 1), pg. 11 (map noting acreage removed along River).

the location of Management Plan boundaries. The County considered the Management Plan.

The Management Plan is not a regulatory document and does not "govern" land use decisions. Friends originally contended the Management Plan contains requirements. ... [C]onsistency is not required. But, even if this were the case, the Record does not demonstrate the County has not been maintaining the "character of the River." Also, with the Proposal, setbacks are increased. ...

The setback, which functions the way a critical areas setback does, is not optional. Consequently, rather than increasing impacts, the Proposal increases aesthetic protections within Management Plan boundaries.

Similarly, the Proposal does not significantly impact tributaries, including in-stream flows and water quality. As addressed in section 2.6.5 above (*see also* section 2.6 more generally), densities are reduced along Rattlesnake and Indian Creeks. Consequently, as with aesthetic impacts, the Proposal increases mitigation for impacts to water quantity and quality.<sup>147</sup>

These findings are verities. There is no federal conflict.

Nevertheless, the County accounted for the River's designation.

### **5.3. Unless Arbitrary, Legislation is Upheld**

#### **5.3.1. Adopting a Zone Virtually Identical to the Adjacent Zone is Not an Illegal Spot Rezone**

The only difference between the overlay zone along the White Salmon River and the surrounding zone is the presence of the River,

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<sup>147</sup> AR 969 (Examiner Decision), Findings 2.9.1.-2.9.4.

which triggers a setback requirement. That is not a spot rezone, and is certainly not an illegal spot rezone. Spot zoning is a:

zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan.<sup>148</sup>

To remand a spot rezone, it must also be “illegal.”<sup>149</sup> As the overlay was neither illegal nor a spot rezone, the superior court erred in not granting the County’s motion, and granting FOCG’s.

#### **5.3.1.1. FOCG Failed to Demonstrate an Irrational and Illegal “Spot Rezone”**

The overlay zone is not “totally different from and inconsistent with” the classification of the surrounding property, a prerequisite for a spot rezone claim.<sup>150</sup> In fact, **the surrounding zoning is exactly the same – they are both RR2.** The one difference is that doubled setbacks are now required within the overlay, as it is next to the White Salmon River.<sup>151</sup> The setbacks were adopted to address public comment on protecting the River.<sup>152</sup> However, if the property owner opposes the setback increase, the individual may, in the alternative, develop under the

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<sup>148</sup> *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 368-70, 662 P.2d 816 (1983) (light manufacturing within industrial park surrounded by residential uses was not an illegal spot rezone); *see also Murden Cove Preservation Ass’n v. Kitsap County*, 41 Wn. App. 515, 520-21, 704 P.2d 1242 (1985) (no spot rezone from adoption of Light Manufacturing zone where area was transitioning to commercial uses).

<sup>149</sup> *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 368.

<sup>150</sup> *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 368.

<sup>151</sup> AR 48 (Ordinance), KCC 19.54.A.020.

<sup>152</sup> AR 6 (Ordinance), Finding E-8.

preexisting, underlying, Resource Lands zoning.<sup>153</sup> This balanced property rights, environmental protection, and the varying views on the Resource Lands zoning.<sup>154</sup>

The overlay and Resource Lands zoning are also compatible. In both the old and new zoning, the Resource Lands zoning surrounds, almost in its entirety, the area zoned RR2.<sup>155</sup> Both zones allow residential development. RR2 limits densities to one unit per two acres, while the Resource Lands zone allows a range from 1/4 acre lots to 20 acre lots.<sup>156</sup> The overlay does not allow land uses which are “totally different from and inconsistent with” the adjacent zoning. If anything, the overlay increases compatibility with the surrounding RR2 zone. In any case, the zoning overlay sunset in 2012, potentially mooted the issue.<sup>157</sup>

#### **5.3.1.2. FOCG Failed to Demonstrate Increasing Setbacks is Illegal**

Even if the overlay was a spot rezone, it is not illegal. In determining legality, “the main inquiry of the court is whether the zoning action bears a substantial relationship to the general welfare of the affected community.”<sup>158</sup> A zoning district is not illegal unless “the spot zone grants a discriminatory benefit to one or a group of owners to the

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<sup>153</sup> AR 48 (Ordinance), KCC 19.54A.020(A).

<sup>154</sup> AR 4, 6 (Ordinance), *see* Findings D-3, D-4, and E-2 - E-8.

<sup>155</sup> AR 12 (zoning map); AR 200009-10 (maps comparing old and proposed zoning).

<sup>156</sup> AR 46 (Ordinance), KCC 19.53.070(D); AR 45 (Ordinance), KCC 19.53.050(D); AR 5 (Ordinance), Finding D-6.

<sup>157</sup> AR 47 (Ordinance), KCC 19.54A.010(A).

<sup>158</sup> *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 368.

detriment of their neighbors or the community at large without adequate public advantage or justification....”<sup>159</sup> The overlay zone does not.

The overlay applies to all properties within the overlay area. All property owners were mailed notice via certified mail of the opportunity to vest, before the 2012 sunset date.<sup>160</sup> In unchallenged findings, the County determined it was in the public interest to enact RR2 zoning on a pilot basis, if River setbacks were doubled:

The County has weighed options for incentivizing preservation of land for natural resource use and increasing protections along the White Salmon River. . . .

A key feature of the Management Plan is the designation of certain properties along the White Salmon River as part of the "Management Plan Area." The County has several options. These include not rezoning within this Area, or rezoning the Area, but increasing setbacks to further protect the River.

If property owners within the Management Plan Area were to have the option of increasing development densities contingent on an added 100-foot setback, or retaining the option of developing at allowed densities under the RL zone, this offers a "middle-ground approach." This approach effectively creates an on-site development right transfer, for those property owners who wish to avail themselves of the program.

When coupled with the removal of a narrow strip of land south of the Management Plan Area, the net result is either zoning remains unchanged, or allowed densities increase, but subject to an increase in setback requirements. This

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<sup>159</sup> *Id.*

<sup>160</sup> AR 930-939 (certified mail receipts).

provides mitigation for the portion of the White Salmon River located proximate to the Husum area.

These types of market based strategies which respect both the environment and property rights are becoming increasingly favored. However, because the County has not utilized an on-site development rights transfer approach before, it is appropriate to adopt the strategy on a pilot basis. Property owners would be allowed to vest to an option to utilize the program by filing a "notice of intent" within 30-days. The accompanying Resolution provides for further analysis of this approach, which the County could later elect to make permanent.

Within the Management Plan Area, the Forest Service had originally intended to accomplish an increase in setbacks by purchasing property, but followed through only in limited circumstances. This original commitment, although not implemented, has created an impression in some that property within the Management Plan Area should be more fully used for setbacks and buffering.

The above described incentive approach balances public comment requesting added protection on the White Salmon River (comments raised suggested some may have believed setbacks upwards of 600 feet applied along the River, which is not the case), while being respectful of property rights concerns.<sup>161</sup>

The County's zoning protects the River while planning for growth. It is designed to balance property rights with environmental protections, an approach the appellate courts support:

We are aware of the growing disenchantment with traditional "Euclidean" zoning philosophy and practices under which a municipality is divided into different types of zoning districts, each of which is assigned particular

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<sup>161</sup> AR 6 (Ordinance), Findings E-2 – E-8.

uses. ... Modern land use controls such as Snohomish County's business park zone ordinance are an attempt to anticipate changing patterns of land development and to overcome the inadequacies and inflexibility of orthodox zoning regulations.<sup>162</sup>

With the overlay, based on public comment, the County leveraged a setback increase to further protect the White Salmon River, at the same time it expanded RR2 zoning on a pilot basis in an area planned for modest growth.<sup>163</sup> While FOCG may not like the County's considered policy choice, it was not an illegal spot rezone.

### **5.3.2. A Spot Rezone Does Not Automatically "Trigger" Constitutional Violations**

FOCG's amended complaint included several constitutional claims. When the County moved to dismiss those constitutional claims, rather than conceding them, FOCG stated it was rolling them into its spot rezone claim.<sup>164</sup> FOCG provided no legal support for the position.<sup>165</sup> FOCG was unable to marshal constitutional support for these claims as the judicially created spot rezone doctrine does not automatically create federal separation of powers, equal protection, and due process violations. The analysis in assessing a spot rezone claim is distinct. Because FOCG failed

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<sup>162</sup> *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 369.

<sup>163</sup> AR 6 (Ordinance), Findings E-2 - E-8.

<sup>164</sup> TR (Summary Judgment Hearing, February 28, 2013), pgs. 38-39.

<sup>165</sup> CP 1303-04 (FOCG's Summary Judgment Motion), pgs. 81-82.

to provide argument addressing the County's summary judgment motion, the superior court erred in not dismissing them as abandoned.<sup>166</sup>

#### **5.3.2.1. Federal Separation of Powers Does Not Apply**

Klickitat County is not the federal government, so the federal separation of powers doctrine does not apply. The "separation of powers doctrine embedded in this federal constitution applies only to the federal government, and does not control the functioning of our state government."<sup>167</sup> FOCG did not allege any violation of the Washington State Constitution.<sup>168</sup> Even if FOCG had pled Washington law, dismissal was required. The doctrine "serves mainly to ensure that the fundamental function of each branch remains inviolate,"<sup>169</sup> and "contemplates flexibility and practicality."<sup>170</sup> The "relevant question is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another."<sup>171</sup>

Here, the Board of County Commissioners adopted the Ordinance and Resolution. The Board directed the Planning Department to prepare application forms and guidance, and report back to the Board. The Board

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<sup>166</sup> *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 488, 585 P.2d 71 (1978), superseded by statute on other grounds (failure to present argument results in its abandonment).

<sup>167</sup> *Carrick v. Locke*, 125 Wn.2d 129, 135, n. 1, 882 P.2d 173 (1994).

<sup>168</sup> CP 295, 298-299, 301 (Amended Complaint), ¶¶ 90, 99, 100, 112, and 113.

<sup>169</sup> *Spokane v. Spokane County*, 158 Wn.2d 661, 679, 146 P.3d 893 (2006).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 680, internal quotations and emphasis omitted.



determined when the zoning overlay would sunset. As with any zoning regulation, it is up to the property owner to determine whether to vest or not.<sup>172</sup> As the Board adopted the legislation, even if FOCG had raised and argued a Washington separation of powers claim, dismissal was required.

#### **5.3.2.2. Absent Irrationality, an Equal Protection Claim is Dismissed**

As the County's legislation was not "irrational," the superior court erred in not dismissing FOCG's equal protection claim.<sup>173</sup> Absent a suspect class or fundamental right, an ordinance is examined "with minimal scrutiny," and "presumed constitutional."<sup>174</sup>

The question on an equal protection claim "is not whether the statute is discriminatory in nature, nor is it of paramount concern if the classifications results in some inequality."<sup>175</sup> Legislation is upheld as long as the classification's relationship to the legislative purpose is not so attenuated as to render it arbitrary or irrational.<sup>176</sup> A court considers if the legislation applies alike to members of a class, there are reasonable grounds to distinguish between those within and without the class, and if the classification has a rational relationship to the legislation's purpose.<sup>177</sup>

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<sup>172</sup> *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 873, 872 P.2d 1090 (1994) (municipalities have wide discretion to "develop vesting schemes best suited to the needs of a particular locality.").

<sup>173</sup> U.S. Const., Amend. 14 (no state shall "deny to any person within its jurisdiction the equal protection of the laws.")

<sup>174</sup> *Jeffery v. McCullough*, 97 Wn.2d 893, 896-97, 652 P.2d 9 (1982).

<sup>175</sup> *Griffin v. Dep't. of Social & Health Services*, 91 Wn.2d 616, 627, 590 P.2d 816 (1979).

<sup>176</sup> *Markham Advertising Co. v. State*, 73 Wn.2d 405, 427-28, 439 P.2d 248 (1968).

<sup>177</sup> *Philippides v. Bernard*, 151 Wn.2d 376, 391, 88 P.3d 939 (2004).

Zoning regulation is “accorded a sufficient degree of flexibility for experimentation and innovation. We cannot substitute our judgment of what would be the most effective method of regulation ....”<sup>178</sup> As set forth in unchallenged findings, the County legislation is related to legitimate public interests and is not arbitrary.<sup>179</sup> The superior court erred in not dismissing the claim.

#### **5.3.2.3. Without a Protected Interest, a Due Process Claim is Dismissed**

Because FOCG failed to identify any constitutionally protected interest, the trial court erred in refusing to dismiss the due process claim. “The threshold question in every due process challenge is whether the challenger has been deprived of a protected interest in life, liberty, or property.”<sup>180</sup> When, as here, a party fails to establish a protected interest, the court does not proceed with the due process analysis.<sup>181</sup>

The County has the authority to implement a process for mitigation and to adopt principles to implement that process, and FOCG conceded that the Resolution could be constitutionally implemented.<sup>182</sup> The County has authority to adopt zoning with varying densities and setback requirements, and to provide a sunset date which precludes further

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<sup>178</sup> *Northend Cinema v. Seattle*, 90 Wn.2d 709, 719, 585 P.2d 1153 (1978) (decision to disperse location of adult movie theaters was not of constitutional significance).

<sup>179</sup> AR 6 (Ordinance), Findings E-2 – E-8; see also section 5.3.1.2 above.

<sup>180</sup> *In re Pullman*, 167 Wn.2d 205, 211-12, 218 P.3d 913 (2009).

<sup>181</sup> *Wash. Indep. Tel. Ass’n. v. Wash. Utils. & Transp. Comm’n.*, 149 Wn.2d 17, 25-26, 65 P.3d 319 (2003).

<sup>182</sup> TR (Summary Judgment Hearing, February 28, 2013), pg. 76:3-8.

vesting.<sup>183</sup> Even if FOCG had identified a protected interest, its due process claim should have been dismissed as a matter of law.

### **5.3.3. County Adopted the Rezone: County Action was Consistent with Ch. 36.70 RCW**

The County complied with the Planning Enabling Act, Ch. 36.70 RCW. As FOCG presented no argument as to how Ch. 36.70 RCW might have been violated, and in fact invited the superior court to dismiss any unlawful delegation claim with respect to the Resolution,<sup>184</sup> FOCG abandoned the claim and the superior court should have granted the County's summary judgment motion.<sup>185</sup> Further, the Board adopted Ordinance O060512-1<sup>186</sup> and Resolution 08612.<sup>187</sup> No other person or entity adopted a regulation or planning policy under Ch. 36.70 RCW. Because the Board issued these decisions, County action was consistent with RCW 36.70.650, which provides for the Board to make final legislative decisions. Once made, the Board delegates implementation and enforcement, and it is up to property owners to decide when to vest to

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<sup>183</sup> AR 47-48 (KCC 19.54A.010, .020); *See e.g., Carlson v. Bellevue*, 73 Wn.2d 41, 45, 435 P.2d 957 (1968), internal cites omitted, *citing Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 Sup. Ct. 114 (1926); *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 873, 872 P.2d 1090 (1994).

<sup>184</sup> TR (Summary Judgment Hearing, February 28, 2013), pg. 76:3-8 ("Plaintiff submits this Court can dismiss the unlawful delegation claim with respect to the FFR [Resolution] without prejudice. We are not conceding that it will be implemented lawfully, constitutionally in any way, shape or form. Remains to be seen.")

<sup>185</sup> AR 1353-1365 (FOCG's Response to County's Summary Judgment Motion); AR 967 (County's Summary Judgment Motion), pg. 21; *Seattle School District No. 1 v. State*, 90 Wn.2d 476, 488, 585 P.2d 71 (1978), superseded by statute on other grounds (failure to present argument results in its abandonment).

<sup>186</sup> AR 10 (Ordinance).

<sup>187</sup> AR 54 (Resolution).

zoning. As a matter of law, even if FOCG had provided responsive argument, there was no Ch. 36.70 RCW violation.

#### **5.3.4. The Rezone is Consistent With the Plan**

The County's zoning legislation is consistent with the Comprehensive Plan. There are many ways to implement the Plan. "A comprehensive plan is a blueprint which suggests various regulatory measures."<sup>188</sup> And, the policies FOCG identified use the word "should" and afford the County significant discretion on implementation. The superior court erred in granting FOCG summary judgment.

##### **5.3.4.1. Plan Identifies the Area for Residential Development**

The Plan provides that "[g]enerally, unsewered areas with **severe soil limitations** for development **should** not be developed at a density greater than one unit per five acres."<sup>189</sup> As the Plan identifies the area as generally suitable for residential development, the County's rezone legislation is consistent.<sup>190</sup>

Also, County regulations place strict limits on lot size in areas with soil limitations. The State Department of Health approved the regulations, which are consistent with Ch. 246-272A WAC.<sup>191</sup> Under these

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<sup>188</sup> *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d at 371; see RCW 36.70.545.

<sup>189</sup> AR 209958 (SEPA Ex. 12, Comprehensive Plan, p. 29).

<sup>190</sup> See e.g., AR 209936, 209940, and CP 1208, correcting AR 209942A (SEPA Ex. 12, Comprehensive Plan), pgs. 16, 17, and 20), *see also* AR 25-26, and 29 (Comprehensive Plan plans for appropriately sited residential development in the area).

<sup>191</sup> AR 210998 (SEPA Ex. 46), State Health Dept. correspondence.

regulations, areas with severe soil limitations which cannot accommodate on-site septic cannot be approved. The regulations establish septic system setbacks,<sup>192</sup> and require professional site evaluations.<sup>193</sup> "Regardless of lot size," septic systems which do not meet minimum requirements, which include adequate soil conditions, are not approved.<sup>194</sup> The County's zoning – which applies in an area the Plan designates as appropriate for residential growth - is consistent with the Plan.

#### **5.3.4.2. County Plans for Growth in its Rural Communities**

The Plan states "[f]uture growth **should** occur primarily in the existing urban centers and rural communities. Rural areas **should** be developed at low densities."<sup>195</sup> As the legislation does this, the superior court erred in granting FOCG summary judgment.

The County is planning for growth in Husum and BZ Corner. These are local, rural communities, and the only two urban centers within the Planning Area. The Update properly plans for growth in these two areas. This is established through unchallenged findings,<sup>196</sup> and addressed by FOCG's own witness, before the County Hearing Examiner:

Q I'm going to point you to these aerial photographs that are, I believe, Exhibit 30 in the record.

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<sup>192</sup> AR 211014-15 (SEPA Ex. 46), KCC 8.10.080, Table IV Minimum Horizontal Separations.

<sup>193</sup> AR 211016-17 (SEPA Ex. 46), KCC 8.10.090, *see* definitions, KCC 8.10.030.

<sup>194</sup> AR 211030 (SEPA Ex. 46), KCC 8.10.220(2)(d), and Ch. 8.10 KCC generally).

<sup>195</sup> AR 209957 (Comprehensive Plan) pg. 28.

<sup>196</sup> AR 4, 5, 9 (Ordinance), Findings D-1, D-10, J-1, J-2; AR 948, 954 (Examiner Decision), Findings 2.1.4, 2.1.5, 2.4.1, and 2.4.2.

Looking at this kind of planning area, where is the logical place for development to go? I mean, would you -- I mean, where logically development be focused?

A Logically development should be focused in the rural centers, BZ Corner and --

Q Here?

A -- yes. And Husum.

Q Okay. But why is that?

A That is where you can most effectively develop the public infrastructure like water systems and waste -- public waste system, and you can deliver services most economically that way. You can also -- you have fewer worries about people developing their homes up on the hills, you have less concern about catastrophic wildfire so the fire district has less of a developed area that they have to safeguard from wildfire. And lastly, and I would say most importantly it makes fish and wildlife conservation easier to do, less fragmentation and degradation of the habitat.<sup>197</sup>

Requiring minimum two-acre lots within Husum and BZ Corner, where Resource Lands zoning had provided less predictable densities, ranging from a 1/4 acre to 20 acres, is consistent with the Plan. FOCG failed to meet its burden of proof before the superior court with its one sentence argument.<sup>198</sup> FOCG relied on its own comment to the Board which references Growth Board cases relying on a no longer valid "bright line"

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<sup>197</sup> CP 526-27 (TR, SEPA Hearing, December 19, 2011), pgs. 194-195.

<sup>198</sup> CP 1302 (FOCG's Motion), pg. 80:14-17.

density doctrine developed under GMA.<sup>199</sup> GMA does not apply here. But, even if it did, a unanimous Supreme Court rejected the "bright-line" approach.<sup>200</sup> And, the County's one sentence policy guidance on growth location in no way prohibits the densities the County selected.

#### **5.3.4.3. Clustered Development is Encouraged, and Wildlife and Resource Lands Protected**

The Plan states "[c]luster development **should be encouraged** so that the County can remain in its natural condition."<sup>201</sup> This one sentence policy is not mandatory, and the word "should" affords wide discretion. Nevertheless, the legislation incorporates a comprehensive approach to clustering, as articulated in unchallenged findings.<sup>202</sup> It creates three rings of development: the area within Husum and BZ Corner targeted for growth; the Resource Lands ring (which the Update slows land division on); and, the most protective zone, Forest Resource, which was not altered.<sup>203</sup> This approach to clustering is designed to protect natural resource use and environmental attributes, and is consistent with the Plan.<sup>204</sup> In addition, the County has a recently updated clustering

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<sup>199</sup> CP 1302 (FOCG's Motion), p. 80:16-17, citing to AR 452-454.

<sup>200</sup> *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

<sup>201</sup> AR 209972 (SEPA Ex. 12, County Comprehensive Plan, p. 41), emphasis added.

<sup>202</sup> AR 9 (Ordinance), Finding J-1 ("Focusing residential development in the 4% Area, where land is already being divided; where infrastructure is better; and where services can be more efficiently provided, will better protect County resource lands, than planning for more dispersed residential growth throughout the entire Planning Area. Such an approach is intended to result in reducing County capital expenditures over time. The approach is consistent with the Comprehensive Plan.").

<sup>203</sup> AR 20010 (SEPA Ex. 1, Addendum).

<sup>204</sup> *Id.*; AR 9 (Ordinance), Findings J-1 - J-4.

ordinance.<sup>205</sup> As FOCG did not appeal it, FOCG is precluded from challenging the County's approach to clustering.<sup>206</sup> As addressed, the County's legislation protects wildlife and the natural resource base consistent with the Plan's general policies, which also support residential development.<sup>207</sup> With its conclusory and unsupported argument in superior court, FOCG failed to meet its burden to demonstrate any Plan inconsistency.

## 6. CONCLUSION

The superior court erred in granting FOCG summary judgment and denying the County's summary judgment motion. With the County's rezone legislation, development is better planned for and mitigated than under the pre-existing zoning. The County has wide discretion in making legislative decisions and engaging in land use planning, and FOCG failed to demonstrate the action was arbitrary and capricious. With respect to its environmental review, impacts were disclosed by EIS, fully mitigated, and better addressed with County action. FOCG failed to challenge a single legislative or Hearing Examiner finding, and the superior court erred in not accepting the findings as verities.

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<sup>205</sup> AR 849-856 (Cluster Ordinance).

<sup>206</sup> See e.g., *Montlake Community Club v. CPSGMHB*, 110 Wn. App. 731, 43 P.3d 57 (2002) (where new subarea plan did not substantially change earlier adopted plan, a new appeal opportunity was not available).

<sup>207</sup> AR 137-39, 141 (Examiner Decision), Findings 2.7.1.-2.7.6, 2.10.1 - 2.10.2; AR 9 (Ordinance), Findings J-1, J-2; AR 199-200 (Fact Sheet); see AR 209965-66, 209971-72, 209982-83 (SEPA Ex. 12, Comprehensive Plan), pgs. 36-37, 40-41, 51-52.

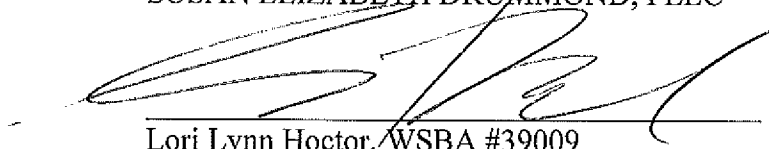


The County requests reversal, and that its legislation and the Examiner's SEPA decision be affirmed.

DATED this 10<sup>th</sup> day of January, 2014.

LORI LYNN HOCTOR  
Prosecuting Attorney for Klickitat County, and

LAW OFFICES OF  
SUSAN ELIZABETH DRUMMOND, PLLC

A handwritten signature in black ink, appearing to read 'Lori Lynn Hctor', is written over a horizontal line.

Lori Lynn Hctor, WSBA #39009  
Susan Elizabeth Drummond, WSBA #30689


**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2014, I served the foregoing  
KLICKITAT COUNTY'S OPENING BRIEF on the parties listed below  
by First Class U.S. Mail, postage prepaid, and e-mail.

Nathan J. Baker Friends of the Columbia Gorge 522 SW 5 <sup>th</sup> Avenue, Suite 720 Portland, OR 97204-2100 nathan@gorgefriends.org	Ralph Bloemers Crag Law Center 917 SW Oak Street, Suite 417 Portland, OR 97205 ralph@crag.org
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I declare under penalty of perjury of the laws of the State of  
Washington that the foregoing is true and correct to the best of my  
knowledge.

SIGNED this 10<sup>th</sup> day of January, 2014, at Kirkland, Washington.

  
\_\_\_\_\_  
Allyson Adamson  
Legal Assistant

**Tab 1**

**Klickitat County  
Hearing Examiner Decision  
AR 946-797**

**BEFORE THE  
Klickitat County Hearing Examiner**

FRIENDS OF THE COLUMBIA RIVER  
GORGE, FRIENDS OF THE WHITE SALMON  
RIVER, CITIZENS FOR COMMON SENSE  
ON THE WHITE SALMON RIVER,

Appellants,

vs.

Klickitat County,

Respondents.

IN RE THE APPEAL OF SEPA 2010-45

**HEARING EXAMINER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
DECISION**

**Section 1      SUMMARY OF DECISION**

1.1      Klickitat County is considering updating the Husum-BZ Subarea Plan and Zoning. To address the State Environmental Policy Act, Ch. 43.21C RCW ("SEPA"), the County issued a Mitigated Determination of Non-Significance and Addendum ("MDNS"), and incorporated four Environmental Impact Statements ("EIS's"). One EIS assesses a range of six alternative development scenarios within the Planning Area; the other three assess impacts associated with development projects within the County and neighboring Skamania County.

1.2      Friends of the Columbia Gorge, Inc., Friends of the White Salmon River, and Citizens for Common Sense Along the White Salmon River ("Friends") appealed. Briefing and exhibits were submitted during the last quarter of 2011; a two-day hearing was held in December, during which additional exhibits were accepted into the Record; post-hearing briefing was provided for; and closing arguments were held in January, 2012.

1.3      Having considered the briefing, testimony, and exhibits, the Hearing Examiner determines that the MDNS is not clearly erroneous. The MDNS is based on sufficient information and the County's mitigation is reasonable and capable of being accomplished. In addition, impacts are disclosed in the four EIS's incorporated by reference. Friends have not met their burden of proof to demonstrate clear error. The SEPA appeal is denied.

1.4      Friends' analysis of the issues helped clarify uses of methodology by the various experts. Although covering a small portion of Klickitat County, this proposal is not only complex but has also been years in the making. The briefing by the parties, and hopefully this decision, can serve as a guide to navigating an exceptionally large record. This voluminous

record adequately informs the Board of County Commissioners of environmental issues as they consider adopting this subarea plan.

## Section 2      **FINDINGS OF FACT**

### 2.1      **Procedural Background - Overview of County SEPA Review**

2.1.1      Klickitat County is located in Southcentral Washington. The County is divided into various planning areas. One of these planning areas is the Husum/BZ Subarea, located on the County's far Western end, next to Skamania County.

2.1.2      The Husum/BZ Planning Area is zoned primarily Resource Lands and Forest Resource, both of which authorize resource uses, such as forestry. The majority of the Planning Area is in such resource use.<sup>1</sup>

2.1.3      The White Salmon River, a fast flowing River with steep banks, runs through the middle of the Planning Area. Highway 141, the primary public road through the area, runs roughly parallel to the River, but largely outside Shoreline Management Act, RCW 90.58 RCW ("SMA"), and Shorelines Master Plan ("SMP") jurisdiction (SMP jurisdiction extends out 200 feet).<sup>2</sup>

2.1.4      Along Highway 141 are a series of more settled and sub-divided areas, including areas referred to locally as "Husum" and "BZ-Corners." These two areas are characterized by greater concentrations of residential development, and previously divided land, including the Fruit Home Colony subdivision in Husum.<sup>3</sup>

2.1.5      To plan for growth, Klickitat County commenced the Husum/BZ Subarea Plan Update in 2007. The core component of the Update is a decision to focus residential growth within Husum and BZ-Corners, which take up less than 4% of the total Planning Area.<sup>4</sup>

2.1.6      To address SEPA, the County initially issued a determination of non-significance, or DNS. Friends of the White Salmon River appealed the DNS. The County Commissioners

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<sup>1</sup> Ex. 1 (Addendum), Appendix 1, Maps; Ex. 30 (aerial photographs).

<sup>2</sup> Ex. 30 (Aerial photos with SMP jurisdiction boundaries, Highway, and River location).

<sup>3</sup> See e.g., Ex. 11 (Staff Report), p. 3 and Appendix, p. 10.

<sup>4</sup> Ex. 1 (Addendum).

held a hearing, and remanded the DNS to the Planning Department for further analysis.<sup>5</sup>

2.1.7 The Commissioners' directed the Planning Department to further document impacts, including potential impacts to water supply.<sup>6</sup> The Commissioners did not determine the proposal necessarily had significant impacts, but that further analysis was required before they made a final decision.<sup>7</sup>

2.1.8 In response to the remand, the Planning Department retained Aspect Consulting, Inc. ("Aspect") to prepare a hydrological analysis. Aspect prepared the analysis, issuing a "Hydrologic Report, Husum/BZ Corner Subarea," on November 4, 2009.<sup>8</sup> The County reviewed the Report, along with other information and documents which had been developed since the remand, and then issued an MDNS the following year, in October, 2010.<sup>9</sup>

2.1.9 The MDNS incorporated two EIS's related to development along the White Salmon River. The first EIS (the Wild & Scenic River Management Plan EIS, or White Salmon EIS) evaluated six alternative development scenarios, including development intensities involving several thousand residences.<sup>10</sup> This level of development exceeds what would occur with the Proposal, or with growth expected county-wide by 2030.<sup>11</sup> The second EIS addresses Condit Dam's removal. Before its removal in 2011, the Dam was located below BZ-Corners and Husum.<sup>12</sup>

2.1.10 Two appeals of this MDNS were filed. The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") filed one appeal.<sup>13</sup> Friends filed the second appeal.<sup>14</sup>

2.1.11 During 2011, the Proposal was further refined, as acknowledged in an Addendum to the MDNS, that was issued in October, 2011.<sup>15</sup> Also, just before the hearing, the County and Yakama Nation entered into a settlement agreement which resulted in the adoption of regulations addressing cultural resource review protocols. The Yakama Nation appeal has been withdrawn.

2.1.12 Also, in 2011, two additional EIS's were issued for proposals within or adjacent to the County. One was the Final Supplemental EIS for the Sundoon Development in Dallesport,

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<sup>5</sup>Ex. 9 (Resolution 11908, Board Decision).

<sup>6</sup> Ex. 9 (Resolution 11908, Board Decision).

<sup>7</sup> *Id.* at ¶ 2.1.6.

<sup>8</sup> Ex. 2 (Hydrologic Report).

<sup>9</sup> Ex. 3 (MDNS).

<sup>10</sup>Ex. 4 (White Salmon EIS).

<sup>11</sup>Ex. 44, 4th pg.

<sup>12</sup>Ex. 5 (Condit Dam EIS).

<sup>13</sup>Ex. 29 (Yakama Nation Appeal).

<sup>14</sup>Ex. 28 (Friends' Appeal).

<sup>15</sup>Ex. 1 (Addendum), *see* pg. 5, 2nd paragraph.

Washington. This EIS assesses potential impacts from a master planned resort (golf course, hotel, residences and supporting commercial uses) located proximate to the Columbia River.<sup>16</sup> The second EIS is for the Whistling Ridge Energy Project, a proposed wind project located across the White Salmon River, just to the west, in neighboring Skamania County.<sup>17</sup> The County's SEPA review incorporates these two documents. All together, the Proposal's SEPA review includes the MDNS, Addendum, and four incorporated EIS's.

## **2.2 Procedural Background - Appeal Hearing**

2.2.1 Following Friends' and the County's inability to resolve the appeal issues, briefing and exhibit disclosure deadlines were established on October 19, 2011. Appellants filed opening briefs, exhibits, and witness lists on November 18, 2011. Klickitat County filed its response December 9.

2.2.2 The hearing was held on December 19 and 20, 2011, in Goldendale, Washington. Friends submitted additional exhibits on December 19. These were accepted into the Record over County objection to the majority of the documents. On December 20, Friends submitted an additional document, which was admitted, again over County objection. There was discussion over when Friends learned of the document; the County submitted an exhibit addressing the issue, which was admitted.

2.2.3 Friends called several witnesses on December 19. These included Mark Yinger from Mark Yinger Associates; Pat Arnold from Friends of the White Salmon River; Rick Till from Friends of the Columbia River Gorge; and Tedd Labbe. Friends re-called Mr. Yinger to the stand on December 20.

2.2.4 The County called Erick Miller, a hydrologist from Aspect Consulting, and Jeff Martin, the Klickitat County Environmental Health Department Director. On December 20, the County called Jay Chennault, a hydrologist with Aspect Consulting, and Mo-chi Lindblad, from the Klickitat County Planning Department.

2.2.5 Post-hearing briefing was authorized, with a reply brief submitted by Friends on December 30, and a Sur-Reply submitted by Klickitat County on January 13, 2012. Closing arguments were heard on January 23, 2012.

## **2.3 Proposal - Description of Zoning Changes**

2.3.1 The Proposal shifts zoning designations within a portion of the Husum-BZ

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<sup>16</sup>Ex. 7 (Sundoon EIS).

<sup>17</sup>Ex. 6 (Whistling Ridge EIS).

Planning Area, referred to during the litigation as the "4% Area," as the changes are occurring in a limited portion of the Planning Area.<sup>18</sup>

2.3.2 Originally, the Proposal included land within the Columbia River Gorge National Scenic Area, but this area was removed from the Proposal.<sup>19</sup> This was followed by the removal of an additional 209 acres. This 209 acres included a strip of land along the White Salmon River in Husum, which extends roughly 200 feet east from the River.<sup>20</sup>

2.3.3 The zoning districts in the area include Resource Lands (RL); Rural Residential 2 (RR2); Rural Residential 1 (RR1); and Rural Center (RC). With RL, densities are assigned through the resource lands evaluation process. With the evaluation, depending on the value of the resources and development suitability of the land, densities of one unit per 5, 10, or 20 acres can be assigned to a parcel. The density assignment is coupled with an open space determination, through which the size of the largest parcel is calculated. The open space lot ranges in size from 75-95% of the original lot. The open space lot is allowed one unit, with the remaining density clustered on smaller lots. With RL, these clustered lots can be as small as 1/4 acre, but are likely larger, given Health Department minimum land area requirements.

2.3.4 The zoning received an award from the American Planning Association after its adoption and has been used for many years by the County to balance resource and residential uses.<sup>21</sup> Friends raised concerns over property owner ability to obtain additional resource lands evaluations every five years, and further divide property, as this creates uncertainty on ultimate densities.<sup>22</sup>

2.3.5 In contrast, the RR2, RR1, and RC zoning provide specific densities of one unit per two acres; one unit per one acre; and one unit per 5,000 square feet. With the proposal, in areas the County has targeted for residential development (BZ-Corners and Husum), RR2 and RR1 zoning increases, while RL is reduced, along with RC, the densest designation. With this shift from RC to primarily RR1; and RL to primarily RR2, there is greater certainty on ultimate densities.

2.3.6 In reviewing the total residential development likely to be built with the rezone, the Klickitat County Planning Department completed a "parcel-by-parcel" land capacity analysis, which considered development constraints on a site-specific basis. The analysis is summarized in Table 1a below. The analysis calculates expected long-term capacity for residential growth

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<sup>18</sup> The percentage is actually less than 4%, but is the term used throughout the litigation.

<sup>19</sup> Ex. 2 (Hydrologic Report), p. 9; Ex. 1 (Addendum), Appendix 1.

<sup>20</sup> This is rough measurement. The narrow strip borders much of the River in the Husum area, with a larger "bulb-shaped" area on its south end.

<sup>21</sup> Ex. 11 (Staff Report), Attachments, pgs. 25-26.

<sup>22</sup> Friends' Opening Brief, pg. 16; *see also* Ex. 31 (WDFW Comment, December 5, 2011).



resulting from the Proposal.

2.3.7 In BZ-Corners, about 220 acres shift from RL to RR2. With this shift, the Department estimated a 20-unit increase in residential capacity.

**Table 1a. Net Increase in Residential Capacity.<sup>23</sup>**

BZ Corner	Current Zoning	Proposed Zoning	Net
RC	65	68	3
RR2	120	137	17

2.3.8 In Husum, RR1 and RR2 acreage increases, while RL and Rural Center (RC) zoning decrease:

- RC (5,000 sf lots). Decreases from 406 acres to 148 acres.
- RR1. Increases from one acre to 198 acres.
- RR2. Increases from 243 acres to 888 acres.<sup>24</sup>

2.3.9 With the 258 acre decrease in RC, the densest zoning designation (5,000 square foot lots allowed), the Planning Department testified that total added development potential for both BZ and Husum is about 259 residences. Total residential development build-out over a 20-year planning period in this area, including existing residences, would be about 683 residences.

**Table 1b. Net Increase in Residential Capacity.**

Husum	Current Zoning	Proposed Zoning	Net
RC	157	96	-61
RR2	80	278	198
RR1	2	104	102

2.3.10 The County's analysis was addressed in the Record, briefing, and testimony.<sup>25</sup> Friends did not contest the analysis. During closing argument, in response to questioning from the Examiner, Friends indicated they did not know whether the analysis was correct or not.

<sup>23</sup> Ex. 1 (Addendum), p. 5; Ex. 22 (Tables); Ex 44 (County Planning Department/Notes – Land Capacity); Testimony, Mo-chi Lindblad, December 20, 2011.

<sup>24</sup> Ex. 1 (Addendum), p. 5 (Addendum shows these figures before 209 acres is removed).

<sup>25</sup> See also Ex. 22 (Land Capacity Tables); Ex 44 (County Planning Department/Notes – Land Capacity).

## 2.4 Proposal - Location

2.4.1 The Proposal is designed to encourage residential growth within Husum and BZ-Corners, an area which has seen a greater concentration of growth, grading, and land division than the surrounding Resource Lands and Forest Resource areas. For example, the Fruit Home Colony subdivision is located in Husum, as is a golf course.<sup>26</sup> This is also where:

- Public waste and water systems can be developed more cost effectively;
- Services can be delivered more economically; and
- There are less concerns about catastrophic wildfires in difficult to access areas.

2.4.2 Much of the Proposal is within the territory of the City of White Salmon Water System and Fordyce Community System. White Salmon is the larger of the two, and its municipal water rights capacity has expanded since the Hydrologic Report was issued. The parties disputed whether Fordyce Community System had 37 connections available through reservation, or whether they were actually in use. Under questioning from the Examiner, the County explained that even if hook-ups are not available within Fordyce, development planned for within water provider territory (as opposed to outside) has a greater likelihood of ultimately hooking up, as water systems do expand hook-up capability.

2.4.3 The Proposal also reduces densities along two tributaries, Rattlesnake and Indian Creeks, and pulls the existing RC designation (the densest designation) away from the confluence of the two creeks. Under the existing RC zoning, which comprises much of the North Husum area around these two tributaries, 5,000 square foot lots are authorized. The Examiner questioned the County on whether densities are in fact being reduced, as the lack of sewer can be expected to force greater lot sizes due to Health Department restrictions. The County explained that even if the likelihood of a significant number of 5,000 square foot lots is low, RC is the densest designation within the Planning Area, so does result in denser development. The County noted that Friends had relied on a report which came to the same conclusion.<sup>27</sup>

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<sup>26</sup> Ex. 11 (Staff Report), pgs. 3 and pg. 10 of Attachments.

<sup>27</sup> Friends' Opening Brief, p. 16; Yakama Nation Ex. E (Shorelines Report), p. 45 ("Rural Center has the most structures per acre, which is consistent with the County zoning. That is to say, more structures exist where zoning allows for higher density – a finding consistent with zoning regulations"), and p. 56 ("In shoreline areas, most development (40% in 2002) exists in Rural Center zoned areas....").

## 2.5 Added Habitat Mitigation

2.5.1 The County is focusing residential development in Husum and BZ-Corners. The County took the position that this would likely make fish and wildlife conservation easier, due to less fragmented development in the Planning Area.<sup>28</sup> To take advantage of that opportunity, the County explained that it developed what has been referred to as the Focused Development and Resource Protection Program, or FDR. Key components include:

- Increased setback distances along the White Salmon River within the Wild and Scenic River Management Plan boundaries by 100 feet;
- Incentives to preserve large lots in the surrounding Resource Lands area; and
- A Mitigation Banking Program, which establishes a more regionalized, comprehensive approach to habitat protection.<sup>29</sup>

2.5.2 The County consulted with the several state agencies, including Washington Department of Fish and Wildlife ("WDFW"), which provided the following comment:

The Washington Department of Fish and Wildlife (WDFW) supports the Husum BZ Corner Sub-Area Plan amendment for the Focused Development and Resource Protection Project. The plan will be a useful planning tool for focused development and conservation efforts in the White Salmon watershed.<sup>30</sup>

The proposed habitat banking mechanism represents significant progress toward achieving a balance between habitat value and human population growth within the subarea... [T]his plan represents a valuable opportunity to facilitate landscape-level conservation of upland wildlife habitats at a more regional scale.<sup>31</sup>

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<sup>28</sup> Friends' witness, Ted Labbe, noted similar benefits associated with concentrating development during his testimony on December 19, 2011. He confirmed that the best location for growth would be within the more developed and cleared areas within Husum and BZ. Friends took the position that this testimony should not be taken as support for the zoning in the exact areas being proposed. However, there does appear to be at least some degree of consensus between the parties on where to focus residential growth, even if precise location, acreage, and other issues are in dispute.

<sup>29</sup> Ex. 1 (Addendum), Appendix 3.

<sup>30</sup> Ex. 31 (WDFW Comment, October 25, 2011).

<sup>31</sup> Ex. 31 (WDFW Comment, December 5, 2011).

2.5.3 During testimony, Friends' witness described the FDR as a positive step, but took the position that further detail was needed to determine its ultimate effectiveness. Friends' witness did note that the County had previously designed complex mitigation strategies for wind development. Both the County and Friends appear to believe these types of mitigation strategies can mitigate impacts and can be accomplished, with Friends disputing only whether these strategies will be accomplished here.

2.5.4 WDFW comment indicates such mitigation is feasible here, and would provide an approach for improving mitigation strategies on a "more regional scale." The County has outlined the steps to be taken in developing the Program; indicated it will continue to consult with relevant state agencies during program development; and has committed to the outlined mitigation. Also, certain elements of the rezone will not occur without property owner participation in the FDR.

## 2.6 Water Resources

### 2.6.1 Stormwater Runoff

2.6.1.1 The Hydrologic Report assessed "water balance," using the Western Washington Hydrology Model ("WWHM"). Friends took the position that this model should not have been used in Klickitat County, although it is used in neighboring Skamania County. They did not call an expert witness who was able to testify on this position. Friends' legal counsel asked their witness to explain his position on whether the model was suited for use in Western Washington, and he indicated he lacked the requisite experience to testify on the issue. ("I don't have a lot of experience there.").

2.6.1.2 The County's expert from Aspect Consulting did address the issue. He explained that WWHM provided a reasonable and appropriate method for calculating the water balance, and it was both cost prohibitive and unnecessary to develop a "model" specific to Klickitat County. Friends referenced an approach to stormwater drainage facility modeling used in Eastern Washington which is used for sizing facilities based on a single large storm event. Aspect explained that these models are incapable of calculating a water balance and are based on the single "100-year" storm, compared to multiple storms occurring on top of each year (*i.e.*, 10-year storm followed by a 5-year storm; followed by another 5-year storm). The single-storm approach had resulted in undersizing of stormwater facilities, a factor which lead to development of WWHM, which addresses the multi-storm scenario.

2.6.1.3 The County's SEPA analysis on stormwater is coupled with a structure for mitigating impacts. Klickitat County stated it imposes stormwater mitigation requirements consistent with the Stormwater Management Manual for Eastern Washington.

Current law and regulations require project proponents to design, construct, operate, and maintain stormwater treatment systems that prevent pollution of State waters. The Manual is a guidance document which provides local governments, state and federal agencies, developer and project proponents with a set of stormwater management practices. If these practices are implemented correctly, they should result in compliance with existing regulatory requirements for stormwater – including compliance with the federal Clean Water Act, federal Safe Drinking Water Act and state Water Pollution Control Act.<sup>32</sup>

2.6.1.4 Below are examples of the County's standard plat conditions imposed on lots under five acres, or where conditions otherwise warrant:

- The applicant shall comply with WA State Department of Ecology (DOE) requirements regarding stormwater runoff. Prior to start of construction, the applicant shall provide documentation of compliance with stormwater requirements (e.g. correspondence to DOE describing proposed construction, response from DOE, copy of permit, etc.)
- A drainage and stormwater runoff plan, prepared by a professional engineer, may be required to be submitted to the Planning Department for approval prior to construction. To the extent feasible, stormwater shall be infiltrated on-site. The plan shall ensure that stormwater leaving the site, in a fully developed state, does not exceed pre-development rates. The common improvements such as detention ponds and drainage ways shall be constructed prior to final plat approval. If needed, easements for common drainage ways and improvements associated with drainage and stormwater management shall be provided.
- Prior to final plat approval, stormwater drainage improvements are to be completed and an engineer shall provide written certification that the improvements have been constructed in accordance with the plan.
- A maintenance agreement shall be submitted to the Planning Department for approval prior to final plat approval; the maintenance agreement shall assign responsibility for future maintenance of the drainage improvements and be filed with the final plat (the face of the plat shall reference the recording information for the maintenance agreement). The maintenance agreement shall include best practices for managing and minimizing impacts from household petroleum products, fertilizers, and detergents.
- All drainage easements shall be labeled on the face of the plat.<sup>33</sup>

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<sup>32</sup> YIN Ex. F (Eastern Washington Stormwater Management Manual), p. 1-2.

<sup>33</sup> Ex. 43 (County Planning Department - Planning History), last page; Testimony, Mo-chi Lindblad, December 20, 2011.

2.6.1.5 In addition, construction activities (clearing, grading and/or excavation) that disturb one or more acres are subject to Ecology's National Pollution Discharge Elimination System (NPDES) Construction Stormwater General Permit,<sup>34</sup> which is designed to prevent pollution of state waters through stormwater runoff from construction sites. This is coupled with the County's Critical Areas Ordinance and Shorelines Master Plan which impose setbacks on development proximate to streams, rivers, and wetlands.

2.6.1.6 Friends did not identify specific areas where there would be significant impacts from stormwater on the environment, nor did they address how the County's standard mitigation; Critical Areas Ordinance; Shorelines Master Plan; added setbacks on the White Salmon River; reduction in development along Rattlesnake and Indian Creeks; and Ecology's stormwater permit requirements would not adequately address stormwater impacts.

#### 2.6.2 Nitrates

2.6.2.1 Nitrates from septic systems are not currently a significant issue within the Husum-BZ Planning Area.<sup>35</sup> With limited exceptions due to fertilizer use in orchards, nitrate concentrations within the Planning Area are generally below 1/ mg/L.<sup>36</sup> Klickitat County's Director of Environmental Health testified that it is unlikely within the Husum-BZ Planning Area, with the absorption of several hundred homes over a 20-year planning horizon, that septic system use would create significant issues which would not be identified and addressed through the existing monitoring and regulatory structure.<sup>37</sup>

2.6.2.2 As the Director testified, where nitrate levels tend to be higher is in agricultural areas with heavy fertilizer use or with older, poorly constructed systems. There have not been significant nitrate issues in the Husum-BZ Planning Area from residential uses. Even at a location where there are two wells within 100 feet of a septic system (which under current standards would not be allowed), the Health Department has not observed significant nitrate issues.<sup>38</sup>

2.6.2.3 Aspect prepared an analysis on nitrates for development levels that are unlikely with the narrowed proposal. The Hydrologic Report assessed impacts associated with

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<sup>34</sup> Construction Stormwater General Permit, National Pollutant Discharge Elimination System (NPDES) and State Waste Discharge General Permit for Stormwater Discharges Associated with Construction Activity, Washington State Department of Ecology, Effective January 1, 2011.

<sup>35</sup> Ex. 31 (County Health Dept. Comment on Addendum), last page; Testimony, Jeff Martin, Klickitat County Environmental Health Director, December 19, 2011.

<sup>36</sup> Ex. 2 (Aspect Report), p. 24.

<sup>37</sup> Ex. 31 (County Health Dept. Comment on Addendum); Testimony, Jeff Martin, Director of Klickitat County Environmental Health Department, December 19, 2011.

<sup>38</sup> Testimony, Jeff Martin, Director of Klickitat County Environmental Health Department, December 19, 2011; *see also* Ex. 31 (County Health Dept. Comment on Addendum).

400, 5,000 square foot lots within a 46 acre area.<sup>39</sup> This level of development will not occur with the Proposal. In fact, RC zoning (which allows these smaller lots) is being reduced with the Proposal.

2.6.2.4 With the Proposal, 259 homes are being added over a 20-year planning period. In BZ-Corners, this is net increase of 3 homes in RC zoning, and 17 homes in RR2.<sup>40</sup> In Husum, RC is being decreased. 198 homes in RR2 may be added; 102 homes in RR1.<sup>41</sup> The residences will not be at the density levels identified in the Hydrologic Report. With this increase in development, the County's Environmental Health Director testified that significant nitrate issues are unlikely.<sup>42</sup>

2.6.2.5 Friends focused on the size of the "drainfield" or "model area" used to measure nitrate dilution. Their preference was to measure not the entire lot being built on, but a much smaller area. Analysis can be prepared this way, and Aspect has done so in the past.<sup>43</sup> Aspect explained that because precipitation does fall over an entire lot and seep into groundwater, diluting it over the area, it makes sense for the model to be consistent with that. Aspect explained in its testimony, that with its analysis, septic effluent within a 1,000 by 2,000 square foot area was mixed with precipitation falling over the entire area, with dilution from groundwater underflow occurring within the aquifer's upper 20 feet. The model was run using a range of aquifer parameters presented in Aspect's Table 3.5 based on available well data.<sup>44</sup> Aspect's analysis was a reasoned, credible approach.

2.6.2.6 Friends' witness used an aquifer permeability of .003 feet/day, which was based on observations of surface soils rather than an examination on the aquifer materials based on well logs.<sup>45</sup> Such permeabilities are representative of tight, dense clays,<sup>46</sup> not the alluvial sediments and quaternary basalt aquifers present in the area.<sup>47</sup> With Friends' approach, 400 homes and 23 homes would have the same impact (45.56 and 45.34 mg/L nitrate respectively).<sup>48</sup> Also, Friend's Exhibit 178 indicates that a single two-acre lot with one drainfield would lead to nitrate loading of 32 mg/L. If this were correct, elevated nitrates would likely be more prevalent within the Husum BZ Planning Area, yet no evidence was presented suggesting this is the case.

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<sup>39</sup> Ex. 2 (Aspect Report), Table 3.5.

<sup>40</sup> Ex. 44 (County Planning Department/Notes - Land Capacity).

<sup>41</sup> Ex. 44 (County Planning Department/Notes - Land Capacity).

<sup>42</sup> Testimony, Jeff Martin, Director of Klickitat County Environmental Health Department, December 19, 2011; *see also* Ex. 31 (County Health Dept. Comment on Addendum).

<sup>43</sup> Friends' Ex. 192.

<sup>44</sup> Ex. 2 (Aspect Report), pgs. 35-36; Testimony, Erick Miller, December 19, 2011.

<sup>45</sup> Testimony, Mark Yinger, December 19, 2011.

<sup>46</sup> Testimony, Mark Yinger, December 19, 2011.

<sup>47</sup> Ex. 2 (Aspect Report); Testimony, Erick Miller, December 19, 2011.

<sup>48</sup> Friends' Ex. 177.



2.6.2.7 The County's Environmental Health Director described the County and State regulatory structure in place to resolve nitrate issues, should they arise. Public water systems are regulated through Chs. 246-290 and 246-291 WAC, and state law requires wellhead protection plans. The City of White Salmon Water System and Fordyce Water Ass'n, which cover much of the area being rezoned, have adopted wellhead protection plans. These plans provide for the monitoring of land use activities and water quality.<sup>49</sup> Exempt wells and septic systems are also addressed through state and local laws, which include setback requirements.<sup>50</sup> Klickitat County has adopted Ch. 246-272A WAC,<sup>51</sup> including well protection measures codified at Ch. 8.10 KCC.<sup>52</sup> These regulations were approved by the State Department of Health on January 7, 2011 ("[T]he Department of Health has reviewed the amendments to the Klickitat County Code regarding on-site sewage systems.... The revisions to Klickitat County Code Chapter 8.10 are consistent with the intent of WAC 246-272A are hereby approved."<sup>53</sup>) Before development is approved, the following is required:

- (a) Site evaluations as required under Section 8.10.090;
- (b) Where a subdivision with individual wells is proposed:
  - (i) Configuration of each lot to allow a one hundred-foot radius water supply protection zone to fit within the lot lines; or
  - (ii) Establishment of a one hundred-foot protection zone around each existing and proposed well site;
- (c) Where preliminary approval of a subdivision is requested, provision of at least one soil log per proposed lot, unless the health officer determines existing soils information allows fewer soil logs;
- (d) Determination of the minimum lot size or minimum land area required for the development using Table X.<sup>54</sup>

2.6.2.8 In addition, Ch. 8.10 KCC includes 35 pages of detailed septic system design requirements, to "[l]imit the discharge of contaminants to waters of the state" and avoid "[a]dverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters."<sup>55</sup> Through a complementary regime, the Planning Department

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<sup>49</sup> Ex. 42 (City of White Salmon Wellhead Protection Plan).

<sup>50</sup> Ch. 173-160 WAC (minimum standards for construction and maintenance of wells); WAC 173-160-171 (requirements for the location of the well site and access to the well).

<sup>51</sup> See Ex. 1 (Addendum), Appendix 5 for general summary; Ex. 46 (County Code excerpts).

<sup>52</sup> Ex. 46 (Health Department regulations, KCC 8.10.020).

<sup>53</sup> Ex. 46 (State Health Department approval letter, followed by Klickitat County Code, Ch. 8.10).

<sup>54</sup> Ex. 46 (Health Department regulations, KCC 8.10.220).

<sup>55</sup> Ex. 46 (Health Department requirements, KCC 8.10.010(1)(b) and (2)(b)), emphasis added.

protects critical aquifer recharge areas (CARAS) through the County's Critical Areas Ordinance.

[CARAS] include wellhead protection areas, sole source aquifers, susceptible ground water management areas, moderately or highly vulnerable areas, moderately or highly susceptible areas. Susceptibility can be estimated using soil permeability, geologic matrix (underlying soils), infiltration rate, and depth to ground water. ...

Mitigation measures shall be utilized to minimize the risk of contamination. These will be tailored to each proposal but will be designed to ensure that development does not present a significant risk of aquifer recharge area contamination. ... The following performance standards shall apply to all regulated uses in areas designated with high susceptibility to aquifer contamination.

- A. Parcels requiring septic systems shall be subject to the minimum lot size requirement of the Klickitat County Health Department, in order to prevent groundwater contamination;
- B. All new development activities shall comply with the requirements of the Washington State Department of Health and the Department of Ecology, as they pertain to ground and surface water protection;
- C. The applicant shall comply with any state or federally required well-head protection program for water supplies;
- D. Wells shall be set back at least 100 feet from adjacent property lines....<sup>56</sup>

2.6.2.9 A monitoring regime operates in conjunction with these regulatory requirements. The County Health Department receives test results for nitrates from both public water systems and private wells. Public water system sampling occurs once a year for "Group A" water systems and every three years for "Group B" water systems. For private wells, water samples are collected when a building permit is applied for. Nitrate samples can also be taken when property is sold, or a new well is drilled. If an area is observed to have increasing nitrate levels, then it would be considered an area of concern for nitrogen and under Klickitat County's On-site Sewage regulations (Chapter 8.10 KCC) and state regulations WAC 246-272A-0320 (adopted by reference, KCC 8.10.010) larger lot sizes or additional treatment would be required.<sup>57</sup>

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<sup>56</sup> Ex. 14 (Critical Areas Ordinance, pgs. 17-18), emphasis added.

<sup>57</sup> Ex. 31, last pg. (County Health Dept. Comment on Addendum); Testimony, Jeff Martin, County Environmental Health Director, December 19, 2011.

2.6.2.10 The Aspect nitrate calculations do not account for these mitigation measures. However, it is this regulatory structure which the County implements, and the Environmental Health Director and Planning Department utilize to ensure impacts are addressed.

#### 2.6.3 White Salmon River Flows

2.6.3.1 Friends stated during closing argument that it was never their position that the Proposal would cause probable, significant adverse impacts on White Salmon River flow levels. Nevertheless, because there was briefing and testimony on this issue, it is addressed.

2.6.3.2 The County's witness testified that even under their maximum build out scenario (which exceeds what will occur under the Proposal), where all increases in consumptive domestic water use is from groundwater in direct hydraulic continuity with the White Salmon River, the impact would not be significant.

2.6.3.3 With the Hydrologic Report's highest water use alternative (Alternative 2a, 815 acre-ft/year), and using a peak monthly withdrawal rate that is twice the yearly average, the baseflow reduction is estimated at 0.7%.<sup>58</sup> (This estimate is based on flow levels at BZ, which are lower than at Husum, located farther down the River. The White Salmon River is what is referred to as a "gaining" River, meaning flows are higher at more downstream locations.) At less than 1%, this amount is not measurable.<sup>59</sup> This figure drops to .04%, when based on likely development.<sup>60</sup> Friends' witness determined through earlier analysis, which was confirmed during testimony, that a .26% impact on River flows is negligible.<sup>61</sup>

#### 2.6.4 Aquifers

2.6.4.1 Aspect testified that with the Proposal, impacts to the aquifers would not be significant.<sup>62</sup> In Husum, much of the area being rezoned is located within the boundaries of the largest water system in the area, as well as a private water association, which can be expected to reduce exempt well use. Aspect assumed some hookups would be available from the Fordyce Water System based on Dept. of Health data,<sup>63</sup> but the analysis does not change significantly, even

<sup>58</sup> Ex. 2 (Aspect Report), p. 32.

<sup>59</sup> Testimony, Erick Miller, December 19, 2011.

<sup>60</sup> The peak consumptive use of 259 exempt wells (increase under Proposal over existing zoning) is 0.04% of White Salmon River baseflow; or, for 329 exempt wells, 0.05% of baseflow. (Computed from per capita consumptive water use (162 gpd) described on Ex. 2 (Aspect Report), p. 20 for 259 and 329 residences and 90% streamflow exceedance for September at BZ Corner shown on Table 2.2. Peak water use is taken as twice the daily consumptive use.)

<sup>61</sup> Testimony, Mark Yinger, December 19, 2011; Friends' Ex. 176 (Aquifer Test Report/Power House Road Test Well), pgs. 10-11.

<sup>62</sup> Testimony, Erick Miller, December 19, 2011.

<sup>63</sup> Appellant's witness indicated he believed the hookups were being fully used. When the County consulted on this issue, it was told hookups had been reserved. Testimony, Mo-chi Lindblad, December 20, 2011. Friends did not

if they are currently in use. Also, the City of White Salmon, the largest water system, has since expanded its water rights.<sup>64</sup>

2.6.4.2 Aspect's larger concern was that if recharge to the Deep Aquifer is NOT occurring, development should proceed with caution. Aspect explained it took this approach because aquifers are compartmentalized within a portion of the Planning Area for which data is available. Based on this data, Aspect was concerned that aquifers throughout the area might also be compartmentalized.<sup>65</sup> If this were the case, withdrawals from the Deep Aquifer could have greater impacts.<sup>66</sup>

The [deeper] CRBG aquifer occurs in discrete fault/structurally bounded blocks with recharge limited to outcroppings of CRBG within the blocks. The City of White Salmon has water supply wells completed within distinct CRBG aquifer blocks and have experienced water level declines since 2003. No water level data is available for the other fault/structural bounded CRBG aquifer blocks in the Husum/BZ Corner area, but the water level decline particularly in the City of White Salmon's Well No. 2, indicate that additional groundwater development of the CRBG aquifer should proceed with caution. As such, increased groundwater withdrawals from the CRBG aquifer are identified as a potential impact under both Alternatives.<sup>67</sup>

2.6.4.3 Understanding the risks of assuming there is no compartmentalization, Aspect took the most conservative approach, which was to assume some degree of compartmentalization within the Deep Aquifer.

2.6.4.4 In contrast, Friends took the position that the aquifers are "leaky," meaning there will be a continued influx of recharge from precipitation, although with this methodology, less impact is shown. Friends' witness based this position on Fordyce Water System Wells pump tests, although these are relatively shallow wells.<sup>68</sup> Given this recharge, with Friends'

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object at the hearing to the County's testimony. *See also* Ex. 2 (Aspect Report), p. 19 (Of 125 approved connections, 88 are in use).

<sup>64</sup> Testimony, December 19, 2011, Erick Miller.

<sup>65</sup> Testimony, Erick Miller, December 19, and Jay Chennault, December 20, 2011.

<sup>66</sup> Testimony, Erick Miller, December 19, 2011.

<sup>67</sup> Ex. 2 (Aspect Report), p. 1. *See also*, p. 18 ("Therefore, recharge to the CRBG aquifer is limited to the specific fault block in which the well is completed. As indicated by depleted groundwater levels in the nearby City of White Salmon water system wells, wells completed in the CRBG aquifer likely have a limited recharge area.")

<sup>68</sup> Friends' Reply Brief, p. 23. The wells are completed at relatively shallow depths. *See* Friends' Ex. 184 (Well logs indicate 280 feet for Well 2; 145 feet for Well 1). Assuming Yinger's testimony is valid that the pump testing of Fordyce wells indicated leakage, then it is only with respect to the upper most CRBG. The potential for deeper groundwater development in the CRBG is indicated Ex. 2 (Aspect Report), Figure 2.2, which shows the depth of the CRBG wells at City of White Salmon (3N/10E-10A2 and 3N/10E-3Q1) relative to Fordyce well 2 (3N/10E-2C06).

theory, there would be less impact on the Deep Aquifer, because recharge is mitigating withdrawals. Erick Miller addressed questions from the Examiner on whether, even if all wells were drilled in the Shallow Aquifer, would this significantly reduce recharge to the Deep Aquifer?<sup>69</sup> Assuming Friends' premise were true, the impact was expected to be minimal.

#### 2.6.5 Tributaries and Water Quality

2.6.5.1 The Proposal reduces development densities proximate to Rattlesnake and Indian Creeks, and moves the densest zoning designation (RC) from the confluence of the two tributaries. Aspect did prepare analysis on potential tributary impacts, assuming exempt wells are drilled in continuity with the tributaries. Aspect calculated total withdrawals, and suggested a mitigation strategy of "locating wells in areas that are not in continuity with the White Salmon tributaries."<sup>70</sup> This is a form of mitigation which reduces potential impacts on those portions of the tributaries on Ecology's 303(d) list, but on which Ecology has not established minimum instream flow levels. By reducing densities in this area, the Proposal cannot be said to have a probable, significant adverse impact.

2.6.5.2 Further north, proximate to BZ-Corners, portions of Gilmer Creek are on the 303(d) list for fecal coliform, as is Rattlesnake. Evidence from Department of Health testimony suggested this was likely due to cattle for Gilmer Creek. For Rattlesnake Creek, DNA testing has not been done to confirm the source. Friends did not present evidence on or explain how residences constructed under the Proposal, with septic systems meeting local Health Department and state Ecology requirements, and complying the Critical Areas Ordinance and SMP setbacks, would create significant fecal coliform impacts.

2.6.5.3 Similarly, the White Salmon River also has 303(d) listings, including for fecal coliform. It is not clear that residential development is creating the impact. Friends did not explain how the Proposal would create significant impacts to White Salmon water quality. The Proposal includes increased setbacks from the River in Husum and removes property along the White Salmon River in Husum. This mitigation is coupled with regulatory requirements (including Health Department septic requirements and the SMP), and Ecology regulations.

2.6.5.4 The Department of Ecology confirmed that during development review, adequate water supplies for both residents and the natural environment must be confirmed.

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<sup>69</sup> Testimony, Erick Miller, December 19, 2011.

<sup>70</sup> Ex. 2 (Aspect Report), p. 2.

We anticipate that as the Husum/BZ Corner Sub-Area builds out, the County will confirm water availability during building permit, subdivision, and/or SEPA review stages. In confirming water availability, there is opportunity to consult with Ecology to confirm water can be supplied consistent with both protecting the water resource for other users and the natural environment. In evaluating the Addendum it appears that Klickitat County has provided information to address questions from the Water Resources Program that were included in the November 5, 2010 SEPA comments from Ecology.<sup>71</sup>

2.6.5.5 Ecology's comment is consistent with County and State requirements, which require confirmation of water supply adequacy, and provides for Ecology enactment of minimum instream flow levels, if necessary.<sup>72</sup> Here, Ecology has not done so, and the Proposal and regulatory structure include mitigation to address impacts.

#### 2.6.6 Condit Dam Removal

2.6.6.1 The County considered Condit Dam's removal in its SEPA Review. In its Report, Aspect described what it expected to occur with removal:

[T]he alluvial sediments and Quaternary volcanic aquifer is in hydraulic continuity with the White Salmon River, which is a gaining river. Although removal of the Condit Dam would potentially lower groundwater levels in the vicinity of Northwestern Lake creating a steeper groundwater gradient; removal of the dam is not anticipated to change the groundwater/surface water interactions. Therefore, the White Salmon River would remain a gaining river with similar groundwater contributions. This would also be the case where the CRBG aquifer is in hydraulic continuity with the White Salmon River (below the Condit Dam). However, for wells completed in either aquifer in the vicinity of the dam, a greater amount of pumping lift would be required in the vicinity of Northwestern Lake in order to induce surface water recharge in response to pumping.<sup>73</sup>

2.6.6.2 The Condit Dam EIS, as supplemented, was incorporated into the County's SEPA review.<sup>74</sup> Friends did not explain how Aspect's analysis, coupled with the actual Condit Dam EIS, failed to address impacts associated with dam removal, other than to note that the EIS did not address impacts from land development associated with the Proposal. However, the EIS did address impacts on water resources from dam removal.<sup>75</sup> Thus, dam removal was accounted for in the County's analysis.

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<sup>71</sup> Ex. 31 (Ecology Comment, December 8, 2011, see also October 26 comment).

<sup>72</sup> RCW 19.27.097; RCW 58.17.110; Ex. 46, pgs. 26-27 (County Subdivision Code).

<sup>73</sup> Ex. 2 (Aspect Report), p. 19.

<sup>74</sup> Ex. 5 (Condit Dam EIS's).

<sup>75</sup> Ex. 5 (Condit Dam EIS's), *see e.g.* Final Supplemental EIS (March 23, 2007), section 4.2.

## 2.6.7 EIS Review

2.6.7.1 The EIS for the Lower White Salmon National Wild and Scenic River Management Plan (White Salmon EIS) evaluates residential and commercial build-out within the Planning Area. It includes six development alternatives, including development intensities exceeding that which would occur with the Proposal.

The existing county zone would permit a density of up to 8.7 dwelling units per acre if community sewer and water systems are provided. While there are no plans to do this now, the potential for tremendous growth exists considering that the Husum rural center is 386 acres and BZ Corner is 112 acres. Given the current size of the rural centers, and if sewer and water are provided, Husum could potentially have as many as 2,864 houses and BZ Corner 672.<sup>76</sup>

2.6.7.2 The White Salmon EIS addresses water resource impacts associated with this level of development. It addresses the potential for impacts to water quality and quantity from these higher levels of development.<sup>77</sup>

2.6.7.3 Friends raised concerns about whether the White Salmon EIS, which was published in 1991, could still be relied on, but Friends did not address the changed conditions which would preclude the County from relying on the analysis. In response, the County argued that what has changed in the intervening years is the regulatory structure. Because the regulatory structure is more rigorous than in 1991, the White Salmon EIS likely overstates impacts.<sup>78</sup>

## 2.7 Wildlife

2.7.1 Friends raised general concerns about wildlife impacts, referencing potential impacts to elk and western gray squirrel. Fish habitat concerns were raised with regard to water resource impacts. At the hearing, Friends identified general concerns regarding the impact of lot sizes on wildlife. This evidence did not account for the fact that Husum and BZ-Corners are already characterized by development and land division to a greater extent than the surrounding areas.

2.7.2 In its reply briefing, Friends did not specifically identify the sensitive wildlife species that would be harmed by the Proposal, referring instead in very general terms to "wildlife habitat" impacts. Friends also did not address the County's Critical Areas Ordinance in any

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<sup>76</sup> Ex.4 (White Salmon EIS), p. IV-46.

<sup>77</sup> Ex. 4 (White Salmon EIS), *see e.g.*, pgs. S-9 - S-11; II-11; III-6 - III-8.

<sup>78</sup> *See* Ex 43 (County Planning Department Planning History); Ex. 14 (Critical Areas Ordinance); Ex. 46 (KCC, excerpts); Ex. 47 (County Code Enforcement Manual).

detail. The Ordinance was adopted through a settlement with WDFW, Ecology, and Commerce.<sup>79</sup> It protects wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas.<sup>80</sup> It includes requirements for analysis, setback delineations, and other performance measures. "Activities may be permitted within a conservation area subject to conditions designed to avoid probable, significant adverse impacts to the conservation area and to protect the functions and values of the conservation area...."<sup>81</sup>

2.7.3 The Critical Areas Ordinance requires a number of measures to address impacts, including a habitat mitigation plan for protected wildlife species, which WDFW is typically consulted on.

2.7.4 Friends' witness acknowledged the County's Focused Development and Mitigation Banking Program, but preferred further detail in the SEPA review.<sup>82</sup> Friends' witness stated the County had in the past successfully designed complex mitigation measures for wind development. And, WDFW has confirmed the mitigation the County has outlined can be accomplished:

The Washington Department of Fish and Wildlife (WDFW) supports the Husum BZ Corner Sub-Area Plan amendment for the Focused Development and Resource Protection Project. The plan will be a useful planning tool for focused development and conservation efforts in the White Salmon watershed.<sup>83</sup>

The proposed habitat banking mechanism represents significant progress toward achieving a balance between habitat value and human population growth within the subarea... [T]his plan represents a valuable opportunity to facilitate landscape-level conservation of upland wildlife habitats at a more regional scope.<sup>84</sup>

2.7.5 WDFW also noted that the Proposal may actually better protect wildlife than existing conditions.<sup>85</sup> Friends' witness indicated that the County's approach to mitigation was the type of comprehensive mitigation identified in his testimony for addressing wildlife impacts.<sup>86</sup>

2.7.6 Wildlife impacts associated with residential development have been assessed in the

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<sup>79</sup> Ex. 14, p. 1.

<sup>80</sup> Ex. 14 (Critical Areas Ordinance), p. 6.

<sup>81</sup> Ex. 14 (Critical Areas Ordinance), p. 14, emphasis added.

<sup>82</sup> Testimony, Ted Labbe, December 19, 2011.

<sup>83</sup> Ex. 31 (WDFW Comment, October 25).

<sup>84</sup> Ex. 31 (WDFW Comment, December 5, 2011).

<sup>85</sup> *Id.*

<sup>86</sup> Testimony, Ted Labbe, December 19, 2011.



White Salmon EIS.<sup>87</sup> This EIS assesses wildlife habitat in the area.<sup>88</sup> The EIS assesses habitat impacts based on six development alternatives. The alternatives are summarized on pgs. II-11 - II-39, with impacts summarized on pgs. S-9-11, and in individual sections on elements of the environment (*see e.g.*, III-11 - III-26, Plants and Animals). The EIS likely overstates impacts, as it predates regulations promulgated after its issuance, including the County's Critical Areas Ordinance.<sup>89</sup>

## 2.8 Aesthetics

2.8.1 Friends' arguments on aesthetic impacts focused primarily on impacts to the White Salmon River corridor. It was their position that significant residential development impacts would occur in the corridor with the Proposal, which would adversely impact the rafting experience on the River. Friends produced pictures at the hearing showing some homes which could be seen from the River, but did not identify the dates of construction. Also, while Friends' witness provided estimates on distances between the River and a few of the homes, Friends' witness was not qualified as an expert to testify as to distance.<sup>90</sup>

2.8.2 In response, the County explained that mitigation is addressed by the narrowing of the Proposal (net increase of 259 homes); existing and Proposal setbacks; and, the River canyon itself, as much of the River runs through a deeply incised canyon with vertical walls.

The view up and down the river in many places is enclosed in a tight frame created by a steep, narrow gorge. ... In many cases, particularly in the upper stretches of the river where the gorge is deepest and most pronounced, the view to the side is less than 50 feet from the edge of the stream. In most of the remaining area, the view is limited to less than 200 feet. In only a few places is it possible to see more than a few hundred feet.<sup>91</sup>

2.8.3 There are minimum setbacks of at least 100-feet along most of the White Salmon River,<sup>92</sup> which reduces potential for visual impacts.<sup>93</sup> Also, the Proposal doubles these setbacks within the Wild & Scenic River Management Plan boundaries.<sup>94</sup> In addition, the PacificCorp property has been removed from the Proposal. This property is a strip of land extending out roughly 200-plus feet along much of the River's boundaries within the Husum area.

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<sup>87</sup> Ex. 4 (White Salmon EIS); *see also* Ex. 7 (Sundoon EIS).

<sup>88</sup> Ex. 4 (White Salmon EIS), pgs. III-11 - III-26.

<sup>89</sup> Ex. 14 (Critical Areas Ordinance).

<sup>90</sup> County objection and Friends' concession on same, Hearing, December 19, 2011.

<sup>91</sup> Ex. 4 (White Salmon EIS), pg. III-46.

<sup>92</sup> *See e.g.* Ex.13 (Shoreline Master Program, pgs. 53-56, including Regulations 5, 9, and restrictions on p. 56.

<sup>93</sup> Ex. 4 (White Salmon EIS), pg. III-47.

<sup>94</sup> Ex. 1 (Addendum), Appendix 3 (Focused Development and Resource Protection Project), p. 15.

2.8.4 In addition, the aesthetic impacts associated with residential development along the White Salmon River were assessed in the White Salmon EIS.<sup>95</sup> Friends did not identify deficiencies in the analysis, other than EIS year of issuance.

## **2.9 Wild and Scenic River Management Plan**

2.9.1 Klickitat County considered the Forest Service's Wild and Scenic River Management Plan ("Management Plan"). When the County incorporated the White Salmon EIS into the MDNS, it included the Management Plan. The Management Plan is addressed in the Addendum and MDNS, and the increased setbacks in Husum are based on the location of Management Plan boundaries. The County considered the Management Plan.

2.9.2 The Management Plan is not a regulatory document and does not "govern" land use decisions. Friends originally contended the Management Plan contains requirements.<sup>96</sup> While the Examiner finds the County's arguments on general consistency credible, consistency is not required. But, even if this were the case, the Record does not demonstrate the County has not been maintaining the "character of the River." Also, with the Proposal, setbacks are increased.

Within the Management Plan area, only those property owners who agree to adding 100 feet to currently required buffers along the White Salmon River and commit to FD participation would be rezoned.<sup>97</sup>

2.9.3 The setback, which functions the way a critical areas setback does, is not optional.<sup>98</sup> Any property transitioning from RL to RR2 triggers it. Consequently, rather than increasing impacts, the Proposal increases aesthetic protections within Management Plan boundaries.

2.9.4 Similarly, the Proposal does not significantly impact tributaries, including in-stream flows and water quality. As addressed in section 2.6.5 above (*see also* section 2.6 more generally), densities are reduced along Rattlesnake and Indian Creeks. Consequently, as with aesthetic impacts, the Proposal increases mitigation for impacts to water quantity and quality.

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<sup>95</sup> See e.g., sections on aesthetic issues in the White Salmon EIS, Ex. 4, pgs. II-44 - 45 (visual impacts management) and pgs. III-46 - III-47, describing visual impacts.

<sup>96</sup> Environmental Appellants' Opening Brief, p. 25.

<sup>97</sup> Ex. 1 (Addendum), Appendix 2 (Focused Development and Resource Protection Project), p. 15, emphasis added.

<sup>98</sup> Ex. 1 (Addendum), Appendix 3, p. 16, fn. 7 ("setbacks ... shall be construed to mean the same as 'buffers' under the critical areas ordinance, although boat access to the river where the river is readily accessible would be provided for." The boat access language recognizes the limited access points along the River, and the corresponding need to preserve them.

## **2.10 Farmlands**

2.10.1 Friends did not identify “prime farmlands” which the Proposal would significantly impact. In their opening brief, Friends did reference a soils map indicating the presence of “prime and unique” soils in the rezone area.<sup>99</sup> However, aerial photos, and additional documentation submitted by the County,<sup>100</sup> illustrate that much of the area is developed and has been divided.<sup>101</sup>

2.10.2 It is the County's position that with the Focused Development and Resource Protection Program, the Proposal is designed to better protect lands devoted to resource use (including agriculture) and focus development where it is most efficiently served with infrastructure.

## **2.11 Cultural Resources**

2.11.1 The Yakama Nation addressed cultural resources in their briefing. However, their appeal has since been settled, with the County's adoption of additional regulations addressing cultural resource review within the Husum-BZ Planning Area.

2.11.2 In its briefing, the County outlined its approach to cultural resources review; how it has approached mitigation on various projects; and described the cultural resources guidance<sup>102</sup> applicable within the Husum-BZ Planning Area.

2.11.3 Friends did not present evidence or argument at the hearing on cultural resources, nor did it address the County's arguments raised in its opposition brief. Friends also did not address how the state regulatory structure; County review; and guidance would not adequately address these issues. In addition, cultural resource impacts associated with development within the Planning Area are addressed in the White Salmon EIS.<sup>103</sup>

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<sup>99</sup> Friends' Opening Brief, p. 20:19-22.

<sup>100</sup> Ex 30 (Aerial photos); Ex 11 (Staff Report), p. 3.

<sup>101</sup> Ex. 1 (Aerial photos, with proposed zoning lines superimposed); *see also* Ex. 12 (Comprehensive Plan), pgs. 21-23, indicating absence of Class I or II soils.

<sup>102</sup> *See* Ex. 32 (Corrected Addendum with cultural resources guidance document).

<sup>103</sup> Ex. 4 (White Salmon EIS), *see e.g.*, pgs. III-30 - III-35, and summary of impacts, S-9 - S-11.

### Section 3      CONCLUSIONS OF LAW

#### 3.1      SEPA Requirements Generally, and Standard of Review

3.1.1    An EIS is "prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact."<sup>104</sup> SEPA does not require a consideration of remote or speculative impacts.<sup>105</sup> For a non-project action, site-specific analysis is not required.<sup>106</sup> EIS's are reviewed under the "rule of reason."

3.1.2    Where impacts are mitigated below a threshold level of probable, adverse significance, an MDNS can be prepared. An MDNS is reviewed under the "clearly erroneous standard."<sup>107</sup> If there is "information sufficient to evaluate the proposal's environmental impact" and the mitigation measures are "reasonable and capable of being accomplished" the MDNS decision is not clearly erroneous.<sup>108</sup>

3.1.3    MDNS's are not precluded for "large and complex" projects,<sup>109</sup> and are routinely used for a wide range of proposals. The MDNS upheld in *Moss v. Bellingham* involved a 79-acre, 172-lot subdivision in a forested area with ridges and swales criss-crossed by two creeks. The MDNS upheld in *Anderson v. Pierce County* involved a 33-acre soil bio-remediation facility that would use bacteria to break down petroleum hydrocarbons in contaminated soils.<sup>110</sup>

3.1.4    "Substantial weight" is given to the agency's SEPA determination, and deference is accorded to the County's choice of scientific methodology.<sup>111</sup> "[W]hen an agency is presented with conflicting expert opinion on an issue, it is the agency's job and not the job of the reviewing appellate body, to resolve those differences."<sup>112</sup>

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<sup>104</sup> RCW 43.21C.031(1).

<sup>105</sup> WAC 197-11-060(4).

<sup>106</sup> WAC 197-11-442.

<sup>107</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997); *Moss v. City of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001).

<sup>108</sup> *Id.* at 302.

<sup>109</sup> *Anderson*, 86 Wn. App. at 306.

<sup>110</sup> See also *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 816 P.2d 37 (1991) (MDNS for woodwaste landfill upheld).

<sup>111</sup> *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 988 P.2d 27 (1999); RCW 43.21C.290.

<sup>112</sup> *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 200-201 (D.C. Cir. 1991) (court deferred to agency's choice of methodology to measure noise impacts); *City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1507 (D.C. Cir. 1994) (court deferred to the agency's expertise in choosing the appropriate noise measurement methodology); *Seattle Community Council Federation v. Federal Aviation Administration*, 961 F.2d 829, 833-34 (9<sup>th</sup> Cir. 1992) ("[I]t is within an agency's discretion to determine which testing methods are most appropriate.").

### 3.2 Water Resources

3.2.1 Friends' case presentation focused on the White Salmon River and the rafting activity which occurs on the River. However, with respect to River flow levels, Friends confirmed during closing argument it has not taken the position that the proposal significantly impacts River flows. The evidence is consistent with this position. The County's expert assessed an impact which is not "measurable" even when based on build-out beyond what is likely with the Proposal, and Friends' produced a document from their water resources witness describing a .26% impact as "negligible."

3.2.2 With respect to aquifer impacts, the County's expert witness calculated maximum withdrawals from exempt wells with the Proposal, and testified that withdrawals even in this amount would not be significant. Much greater withdrawals than enabled under the Proposal were assessed in the Hydrologic Report and could be accommodated without significant impact.

3.2.3 Aspect was concerned that if too many wells were to be completed in the Deep Aquifer, there could be an impact. As demonstrated by the City of White Salmon wells, if wells were drilled in a "compartmentalized" aquifer, they would have limited recharge, and withdrawals could ultimately impact that compartmentalized area.

3.2.4 In contrast, Friends took the position that the aquifers are "leaky," meaning they are connected, and recharge to the Deep Aquifer is occurring. If this were the case, this would alleviate Aspect's concerns as to limited recharge.

3.2.5 Friends' concern was that if the aquifers are leaky, and water is being pulled from the Shallow Aquifer, that would mean less water would be recharging the Deep Aquifer. The County's witness testified that if that were the case, any impact is de minimus, given the constant recharge occurring through precipitation.

3.2.6 The Examiner finds the Aspect analysis credible. While degree of compartmentalization cannot be known with certainty, Aspect's methodology was reasoned, and erred on the side of caution. Even if Friends' approach were correct, and the aquifers were "leaky," this approach to the analysis likely results in less impacts. Either way, Friends have not met their burden of proof to demonstrate there are probable significant adverse impacts on aquifers from the Proposal.

3.2.7 The County did consider Condit Dam's removal in its analysis. Aspect considered the issue, and disclosed its potential impacts, and the County incorporated the Condit EIS. While the Condit EIS does not examine the Proposal, it does address water resource impacts associated with Dam removal.

3.2.8 Friends addressed impacts on Rattlesnake and Indian Creeks. The Proposal is reducing densities in this area, so cannot be said to have a probable, significant, adverse impact. Nevertheless, the County's expert witness did calculate total impacts associated with full-build out. Aspect assumed for purposes of this calculation that the exempt wells associated with the Proposal's full build-out were in direct continuity with the tributary, and Friends did not dispute the analysis.

3.2.9 Friends did not address application of the County's critical areas ordinance, or the existing regulatory structure which addresses tributary impacts. As the County explained, all applications must comply with state laws concerning water rights and water resources. Building permits and plats alike require confirmation of water supply, and if an exempt well is used water usage may not exceed amounts authorized by RCW 90.44.050. In addition, development must comply with setbacks for streams and rivers.

3.2.10 Ecology comment indicated that with the narrowed Proposal, their concerns as to water resources had been addressed. And, as development occurs, Ecology is consulted on water supply adequacy, to meet both human consumptive and environmental resource needs.

3.2.11 Stormwater associated with the Proposal is unlikely to create significant adverse impacts. Total impacts were disclosed in the Hydrologic Report. Friends disputed use of the WWHM, but did not provide expert testimony refuting the County's explanation on how and why it was used.

3.2.12 Friends did not address standard County mitigation for addressing stormwater, and how this in conjunction with Ecology's permit system would not mitigate stormwater impacts. Friends have not met their burden of proof to show probable, significant adverse impacts from the Proposal on stormwater.

3.2.13 Nitrates are not currently a significant issue in the Planning Area. The County Health Department Director testified that with build-out under the Proposal significant impacts are unlikely, and would be mitigated through the County and state's regulatory structure, which includes testing and monitoring for nitrates. The testimony was based on his inspection of septic systems and review of monitoring data throughout the County, including within the Planning Area. The testimony was credible.

3.2.14 The County and Friends disputed likely nitrate levels with build-out under the modeling scenarios each prepared. Friend's witness, Mr. Yinger, estimated nitrate concentrations by diluting a limited drainfield area and assuming a lesser degree of soil permeability. Aspect utilized a larger planning area section and higher degrees of soil permeability. Aspect's analysis was credible. Mr. Yinger's analysis would result in two-acre lots with large nitrate concentrations, a result which is not occurring in the Planning Area. And, results for varying densities with Mr. Yinger's approach were about the same.

3.2.15 Friends did not explain how the County and state regulatory structure would not address nitrate issues, were they to arise. Mr. Yinger did note other areas in the County and state where there were nitrate issues and how they were being addressed. The County Health Department Director noted this as well. There was a suggestion that "fixes" could be expensive, but Friends did not provide data on remediation costs, and no evidence suggested "fixes" through addressing water filtration; well casing; or other mitigation measures, were not feasible or would not occur if needed to ensure the safety of potable water.

3.2.16 Water resource impacts were described in the White Salmon EIS. Water quality and quantity impacts from six development alternatives were disclosed. Friends did not explain how the analysis was deficient, other than noting the EIS is from 1991. However, passage of time alone does not negate the utility of an EIS.<sup>113</sup>

3.2.17 The White Salmon EIS assesses impacts associated with much higher development levels. The County prepared a parcel-by-parcel land capacity analysis, which assessed likely development levels which would occur as a result of the rezone. The analysis was documented in exhibits and addressed during testimony from the Planning Department staff, Mo-chi Lindblad. This analysis is more consistent with the state's population growth estimates for the County as a whole, than estimates in the Hydrologic Report or White Salmon EIS, which are based on significantly higher development levels. The Examiner finds the analysis credible. Thus, the EIS (issued in a less stringent regulatory environment than today) informs the County of "worst-case" impacts on water resources.

3.2.18 The White Salmon EIS is coupled with EIS's on Condit Dam's removal; a mixed-use golf-course development; and impacts associated with clearing land for a neighboring wind farm. These three EIS's assess impacts associated with a divergent range of development. But, combined with the White Salmon EIS, the EIS's adequately inform the County's review of the Proposal.

3.2.19 Friends have not met their burden of proof to demonstrate there are probable, significant, adverse impacts on water resources either not mitigated below a level of probable significance, or disclosed in an EIS.

### **3.3 Wildlife**

3.3.1 Friends did not meet their burden of proof to demonstrate there are probable, significant adverse impacts on wildlife. Friends referenced the elk, western gray squirrel, and fish species. Friends concern was that in general, density increases would impact habitat. However, with the modest influx of residential development, existing regulatory structure (which is coupled with added mitigation; and, a decrease in the densest zoning designation), significant impacts are not likely.

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<sup>113</sup> *Barrie v. Kitsap County*, 93 Wn.2d 843, 613 P.2d 1148 (1980).

3.3.2 Western gray squirrel habitat is protected through the Critical Areas Ordinance. The squirrel's areas of primary association, such as nest trees, constitute Critical Wildlife Habitat Conservation Areas under the County's Critical Areas Ordinance. A Habitat Management Plan ("HMP") is formulated to regulate development within such Critical Wildlife Habitat Conservation Areas and must meet a variety of criteria to protect those areas.<sup>114</sup> WDFW is typically consulted on these HMP's.<sup>115</sup>

3.3.3 A similar approach is taken for elk (a game species) and fish habitat. Where a project is likely to impair "habitat functions and values," a habitat mitigation plan is required, unless the applicant takes steps to avoid the impact by limiting the magnitude of the action and its implementation. In addition to Critical Areas Ordinance and Shoreline Master Program requirements, the Proposal does not significantly impact water resources which would significantly impact fish habitat, as addressed in sections 2.6 and 3.2.

3.3.4 This existing regulatory structure is coupled with the County FDR, which increases setbacks in certain areas, and develops a habitat banking program. While it is not known how much acreage will ultimately participate in the FDR, the County has committed to the FDR, the County has outlined the implementation steps it will be taking, WDFW supports its implementation, and this type of comprehensive mitigation has occurred elsewhere. As Friends noted, this a positive step, and does supplement the existing regulatory structure. Detailed implementation plans are not required at the SEPA stage. It is enough that mitigation is reasonable and capable of being accomplished.<sup>116</sup>

3.3.5 Both WDFW and Ecology commented on the Proposal. Neither, in their comments on the narrowed proposal, indicated there were significant issues.

3.3.6 Given the existing regulatory structure, the additions the County is making, and the modest influx of residential development expected, the Examiner does not find the Proposal has a probable, significant adverse impact on wildlife.

### 3.4 Aesthetics

3.4.1 Friends did not meet their burden of proof to demonstrate where, along the White Salmon River, the Proposal was likely to create significant impacts. The Proposal increases mitigation for aesthetic impacts along a significant portion of the River, and the modest increase in residential development is mitigated through the existing regulatory structure.

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<sup>114</sup> See Ex. 14 (CAO), ¶ 4.3.

<sup>115</sup> Testimony, December 19, 2011, Ted Labbe.

<sup>116</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997).



3.4.2 In Husum, along the White Salmon River, all property within Wild & Scenic River Management Plan boundaries must add 100 feet to existing setbacks before making use of the proposed RR2 zoning. If this does not occur, there is no zoning change to that property. In addition, in the Husum area, along the White Salmon River, but outside Wild & Scenic River Management Plan boundaries, the property bordering the River (PacifiCorps property), has been pulled from the Proposal, so there is no change in land use there. Also, densities are being reduced as opposed to increased in North Husum. Thus, in Husum, the County's position that impacts are being mitigated, and likely even reduced, is credible.

3.4.3 In the BZ-Corners area, the County estimates a net increase of 20-homes, all of which must comply with SMP setback, frontage, and clearing requirements. While it is possible that a future residence could be seen from the River, that is the case with the existing zoning as well. And, the influx of residences with the Proposal does not increase significantly enough, particularly when coupled with regulatory requirements (with non-exempt proposals also subject to SEPA review), to create a probable, significant adverse impact on views from the River.

3.4.4 The Hearing Examiner also concludes that the White Salmon EIS assessed aesthetic impacts associated with greater levels of development than the Proposal. Friends did not address how this EIS failed to adequately disclose aesthetic impacts, other than generally raising arguments about date of issuance. However, passage of time alone, does not negate EIS utility.<sup>117</sup>

3.4.5 Given the existing regulatory structure; added mitigation associated with the Proposal; incised nature of the River itself; and the White Salmon EIS, the Examiner concludes aesthetic impacts are mitigated below a level of probable significance and disclosed in an EIS.

### **3.5 Wild and Scenic River Management Plan**

3.5.1 The County's SEPA review incorporated the White Salmon EIS, which included the Management Plan. The Management Plan is also specifically addressed in the County's SEPA Review. For example, it is accounted for in mitigation described in the Addendum, some of which applies only in Management Plan boundaries. By incorporating the EIS and Management Plan, and addressing it in SEPA review, the County SEPA review considered the Management Plan.

3.5.2 Friends' argued that the Proposal must be consistent with the Management Plan, but did not reference a provision of SEPA which requires such consistency. The County position is that the Management Plan is not regulatory and there is no requirement, SEPA or otherwise, to be consistent, although the Proposal is consistent.

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<sup>117</sup> *Barrie v. Kitsap County*, 93 Wn.2d 843, 613 P.2d 1148 (1980).

3.5.3 Friends did not meet their burden of proof to show consistency is required, and the County's arguments on general consistency are credible. Friends also did not meet their burden of proof to demonstrate that to the extent there may be an inconsistency, this then creates a significant, probable adverse impact under SEPA either not mitigated or addressed in the White Salmon EIS.

3.5.4 Friends took the position that the rafting experience on the White Salmon River would be adversely impacted from the Proposal's impact on aesthetics. However, Friends' did not meet their burden of proof with respect to aesthetic impacts, as addressed in section 3.4.

### **3.6 Farmlands**

3.6.1 Friends did not meet their burden of proof to demonstrate there are probable, significant adverse impacts on farmlands. Friends did not adequately identify the agricultural land which could not continue to be farmed with the proposal, nor how RR2 and RR1 zoning in an area planned for residential growth and divided more than in outlying areas, would have a significant adverse impact on such farmlands.

3.6.2 Friends also did not point to how the White Salmon EIS failed to address impacts from residential development on farmlands.

### **3.7 Cultural Resources**

3.7.1 Cultural resources are addressed through the existing state and local regulatory structure, as explained in the County's opposition brief. The County has developed a Guidance Document in consultation with DAHP (State Dept. of Archaeology and Historic Preservation) which outlines cultural resource review protocol in the area.<sup>118</sup> Friends did not address the extensive argument presented by the County on how local and state laws are implemented during the hearing or on reply.

3.7.2 In addition, cultural resources are addressed in the White Salmon EIS, as well as the Condit Dam and Whistling Ridge EIS's. Friends did not explain how this review was inadequate.

3.7.3 Friends has not met their burden of proof to demonstrate there is a probable, significant adverse impact on cultural resources or that cultural resources were not adequately reviewed in an EIS.

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<sup>118</sup> Ex. 32 (Corrected Addendum).

3.8 Any finding that is better characterized as a conclusion is incorporated into part three of this decision. Any conclusion that is better characterized as a finding is incorporated into part two of this decision.

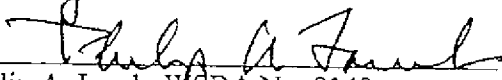
**Section 4      ORDER AND DECISION**

Based on the Findings and Conclusions, the Hearing Examiner orders and decides as follows:

4.1 Klickitat County's SEPA Review 2010-45 is upheld. The MDNS is not clearly erroneous. The MDNS includes an Addendum and incorporates four Environmental Impact Statements. This review adequately discloses probable, significant adverse environmental impacts under SEPA, and also mitigates impacts below a threshold level of significance.

4.2 In consideration of the forgoing Findings of Fact and Conclusions, the appeal filed by Friends (Friends of the Columbia River Gorge, Friends of the White Salmon River, and Citizens for Common Sense on the White Salmon River) is denied.

DATED this 21 day of February, 2012.

By   
Philip A. Lamb, WSBA No. 8148  
Klickitat County Hearing Examiner

**Tab 2**

**Klickitat County  
Ordinance and Resolution  
AR 2-50, 53-57**

ORDINANCE NO. 0060512-1

AN ORDINANCE OF KLINKITAT COUNTY, WASHINGTON, RELATING TO LAND USE AND ZONING; AND AMENDING KLINKITAT COUNTY CODE TITLE 19 RELATING TO ZONING; AND REZONING PROPERTIES WITHIN THE HUSUM BZ CORNER PLANNING AREA; AND ADOPTING A NEW SUBAREA PLAN FOR THE HUSUM BZ CORNER PLANNING AREA.

KLINKITAT COUNTY ORDAINS AS FOLLOWS:

Section I Findings

A. General Background

A-1 Klickitat County is a rural, sparsely populated, South-Central Washington County, with pockets of denser residential development concentrated in a handful of small cities, and several unincorporated "townships." Being 84 miles long, County terrain and weather conditions vary widely from West to East.

A-2 In Central Klickitat County, Goldendale, originally incorporated in 1879, is the County seat and largest City, with 3,407 residents. On the more forested West side, where precipitation levels are considerably higher, the largest city is the City of White Salmon, with 2,224 residents.

A-3 Despite its rural nature, the County has addressed a multitude of complex environmental issues. The County is home to one of North America's largest landfills, and hosts more wind development than any other county in the state. This is due to wind resources and available transmission, as well as extensive upfront planning work on renewable energy development.

A-4 The County has become increasingly popular for tourists, who visit to see not only the wind turbines, but to participate in a variety of recreational opportunities, including hiking, rafting, and windsurfing. With its South side bordering the Columbia River, the County is a favored destination for wind surfing.

A-5 Given these unique attributes, the local economy has become more diversified over the last twenty years. However, forest, agriculture, and ranching uses remain important economic drivers within the County.

A-6 Given these widely varying land uses and development patterns, to assist in addressing the many land use issues facing the County, the County is divided into separate planning areas. One of these planning areas is the Husum BZ Corner Subarea, located on the County's far Western end, adjacent to Skamania County.

## **B. Background, Husum BZ Corner Subarea**

B-1 The Husum BZ Corner Planning Area, with its access to the Columbia and White Salmon Rivers, and comparatively heavy rainfall, is attractive not only for timber, agriculture, and ranching, but also recreational uses and residential development.

B-2 The area is attractive for residential development due to the scenic and recreational resources, as well as the availability of public infrastructure and services in the area. For example, Highway 141, the primary public road through the area, runs through the middle of the Planning Area, roughly parallel to the White Salmon River, but largely outside Shoreline Management Act, RCW 90.58 RCW jurisdiction. Residential growth has tended to concentrate along Highway 141, in a series of more settled and sub-divided areas, including areas referred to locally as "Husum" and "BZ Corner."

B-3 The Planning Area is not heavily populated, and includes no incorporated cities. However, the state projects steady and continued growth throughout the County over the next twenty years. With the Subarea's proximity to the Vancouver/Portland metropolitan area, and recreational resources, it is expected to attract a portion of this growth.

B-4 Because of this, and due to challenges associated with making a living from traditional ranching, farming, and timber activities, there are economic pressures to convert land to residential use. Due to these intensifying pressures, and changing conditions, and the fact that the Subarea Plan has not been comprehensively updated for almost 30-years, updated planning for this area is needed.

## **C. SEPA Review, Background**

C-1 The County completed environmental review through the State Environmental Policy Act, Ch. 43.21C RCW, or SEPA. Originally, the Planning Department issued a SEPA determination in 2007. The determination was appealed to the Board, which remanded to the Department for further analysis.

C-2 As a result of the remand, further environmental review occurred. This review included the Hydrologic Report, Husum BZ Corner Subarea, November 4, 2009, prepared by Aspect Consulting, a water resources consulting firm which has assessed water quality/quantity issues throughout southwest Washington, and the state more generally. During 2010, the Hydrologic Report and related planning issues were further addressed. The Planning Department issued a revised SEPA determination in October, 2010.

C-3 The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) and three environmental groups appealed this determination. The County retained a mediator to address the issues raised, and mediation occurred during 2011. The Yakama Nation appeal was resolved through a settlement agreement executed in 2011, but litigation with the remaining parties continued.

C-4 The County Hearing Examiner upheld the SEPA review, following a two-day hearing in December, with closing arguments presented in January, 2012, and a final decision issued in February, 2012. As a result of this process, there are no SEPA appeal issues for the County Commissioners to decide. However, the SEPA review is part of the Record.

#### D. Subarea Land Use Planning and Zoning

D-1 The Proposal would encourage residential growth within the Husum and BZ Corner "areas," which have, in general, seen a greater concentration of growth than the surrounding area. The Update centers on a policy question on whether to focus development within these limited portions of the Planning Area (less than 4% of it), located along Highway 141, which are more developed than the Planning Area's outlying, more rural sections.

D-2 The zoning districts in the Planning Area include Forest Resource (FR); Resource Lands (RL); Rural Residential 2 (RR2); Rural Residential 1 (RR1); and Rural Center (RC).

D-3 With RL, densities are assigned through what is referred to as a resource lands evaluation process. With the evaluation, depending on the value of the resources and development suitability of the land, allowable densities (within a range set by the zoning code) are assigned to a parcel. This density assignment is coupled with an open space or resource lot determination, through which the size of the largest parcel is calculated. The resource lot constitutes a majority of the original lot. The resource lot is allowed one residential unit, with the remaining density clustered on smaller lots. With RL, these clustered lots can be as small as about a 1/4 acre, but are typically larger, given Health Department minimum land area requirements.

D-4 The RL zoning received an award from the American Planning Association after its adoption, and has been used for many years by the County to balance resource and residential uses, although comments have noted concerns over property owner ability to obtain additional resource lands evaluations every five years, which can result in further property division.

D-5 Some revisions have been proposed to these regulations. Public notice requirements would be increased. To encourage retention of larger lots suited for resource use, consistency with County planning is required where a resource lands evaluation is applied for after five years. The RL zoning was originally developed to apply throughout an area which varies in development suitability, so allows a range of densities as well as flexibility on the size of the "resource lot." This variability has increased over time, which the amended regulations recognize. Also, as an alternative to the RL evaluation process, a twenty-acre minimum lot size is now authorized. This lot size supports continued farming, ranching, and forestry activity, while allowing supporting residential uses at the lowest density the RL evaluation could authorize. This alternative to the resource lands evaluation process will help encourage retention of lots large enough to sustain the traditional natural resource based uses which occur in the area. In opting for this alternative approach, land-owners may forego greater densities in exchange for a simplified review process.

D-6 The RR2, RR1, and RC are more "traditional" zones, which provide specific densities of one unit per two acres; one unit per one acre; and one unit per 5,000 square feet. With the Proposal, in areas targeted for residential development with the Proposal (BZ Corner and Husum), RR2 and RR1 zoning would increase, while RL is reduced, along with RC, the densest designation.

D-7 Concerns were raised about impacts associated with increasing densities in the "4% Area." The Record before the Board (including oral comment from the April 5, 2012, public hearing and subsequent written comment, as well as comment dating back over the multi-year planning process) reflects a divergence of opinion on whether to leave existing planning as is, send the Proposal back for further review, or adopt it as is.

D-8 On balance, the Proposal is expected to increase capacity for growth in the areas being rezoned. However, densities are not expected to dramatically increase. In reviewing the total residential development likely to be built with the rezone, the Planning Department completed a "parcel-by-parcel" land capacity analysis, which considered development constraints on a site-specific basis.

D-9 In BZ Corner, with the Proposal, about 220 acres shift from RL to RR2. With this shift, the Department estimated a 20-unit increase in residential capacity. In Husum, RR1 and RR2 acreage increases, while RL and Rural Center (RC) zoning decrease:

- RC (5,000 sf lots). Decreases from 406 acres to 148 acres.
- RR1. Increases from one acre to 198 acres.
- RR2. Increases from 243 acres to 888 acres; and,

D-10 With the 258 acre decrease in RC, the densest zoning designation (5,000 square foot lots allowed) is reduced. This, coupled with development constraints, led the Planning Department to estimate total added development potential for both BZ Corner and Husum at about 259 residences. Consequently, with the Proposal, total residential development build-out over a 20-year planning period in this area, including existing residences, is estimated at approximately 683 residences. Leaving a greater amount of RL zoning would likely result in less development in the areas being rezoned, but create more of an incentive for growth to occur on a more randomized basis throughout the Planning Area.

#### E. Water Resources, Generally

E-1 Despite being federally designated as a Wild and Scenic River, up until last year, the White Salmon River was blocked by Condit Dam just below Husum. Dam removal is expected to in the long term increase fish habitat area, although the removal has resulted in deposits flooding into the River and down to the Columbia, which is adversely impacting habitat.



E-2 The County has weighed options for incentivizing preservation of land for natural resource use and increasing protections along the White Salmon River. In doing so, the County has considered a variety of planning documents during the review process, including the Forest Service's Wild & Scenic River Management Plan and EIS prepared for that Plan. The Management Plan is not a regulatory document and does not require land use planning consistency. However, public comment drew attention to the Management Plan, and there were comments requesting its consideration.

E-3 A key feature of the Management Plan is the designation of certain properties along the White Salmon River as part of the "Management Plan Area." The County has several options. These include not rezoning within this Area, or rezoning the Area, but increasing setbacks to further protect the River.

E-4 If property owners within the Management Plan Area were to have the option of increasing development densities contingent on an added 100-foot setback, or retaining the option of developing at allowed densities under the RL zone, this offers a "middle-ground approach." This approach effectively creates an on-site development right transfer, for those property owners who wish to avail themselves of the program.

E-5 When coupled with the removal of a narrow strip of land south of the Management Plan Area, the net result is either existing zoning remains unchanged, or allowed densities increase, but subject to an increase in setback requirements. This provides mitigation for the portion of the White Salmon River located proximate to the Husum area.

E-6 These types of market based strategies which respect both the environment and property rights are becoming increasingly favored. However, because the County has not utilized an on-site development rights transfer approach before, it is appropriate to adopt the strategy on a pilot basis. Property owners would be allowed to vest<sup>1</sup> to an option to utilize the program by filing a "notice of intent" within 30-days. The accompanying Resolution provides for further analysis of this approach, which the County could later elect to make permanent.

E-7 Within the Management Plan Area, the Forest Service had originally intended to accomplish an increase in setbacks by purchasing property, but followed through only in limited circumstances. This original commitment, although not implemented, has created an impression in some that property within the Management Plan Area should be more fully used for setbacks and buffering.

E-8 The above described incentive approach balances public comment requesting added protection on the White Salmon River (comments raised suggested some may have believed setbacks upwards of 600 feet applied along the River, which is not the case), while being respectful of property rights concerns.

---

<sup>1</sup> Filing this notice, if coupled with submittal of complete building permit applications and/or a plat application, consistent with Ch. 58.17 RCW and Ch. 19.27 RCW, and local regulations, would vest property owners against future legislative amendments.

E-9 Also, as added protection, with the Proposal, densities along two tributaries, Rattlesnake and Indian Creeks, are reduced, and the existing RC designation (the densest designation) is pulled from the confluence of the two creeks. SEPA issues are not before the Board, but revising the RC zoning to reduce impacts at these locations is consistent with County environmental protection objectives.

#### F. Water Resources, Comments

F-1 Nitrates from septic systems are not a significant issue within the Husum BZ Corner Planning Area. With limited exceptions due to fertilizer use in orchards, nitrate concentrations within the Planning Area are generally below 1/ mg/L. In addition, the County Health Department regulates this issue.

F-2 Klickitat County has adopted Ch. 246-272A WAC, including well protection measures codified at Ch. 8.10 KCC. These regulations were approved by the State Department of Health on January 7, 2011 ("[T]he Department of Health has reviewed the amendments to the Klickitat County Code regarding on-site sewage systems.... The revisions to Klickitat County Code Chapter 8.10 are consistent with the intent of WAC 246-272A are hereby approved.").

F-3 County Code Ch. 8.10, includes about 35 pages of septic system design requirements, designed to "[l]imit the discharge of contaminants to waters of the state" and avoid "[a]dverse effects to public health that discharges from on-site sewage systems may have on ground and surface waters."

F-4 The County Health Department receives test results for nitrates from both public water systems and private wells. Public water system sampling occurs once a year for "Group A" water systems and every three years for "Group B" water systems. For private wells, water samples are collected when a building permit is applied for. Nitrate samples can also be taken when property is sold, or a new well is drilled. If an area is observed to have increasing nitrate levels, then it would be considered an area of concern for nitrogen and under Klickitat County's On-site Sewage regulations (Chapter 8.10 KCC) and state regulations WAC 246-272A-0320 (adopted by reference, KCC 8.10.010) larger lot sizes or additional treatment would be required.

F-5 The City of White Salmon Water System and Fordyce Water Association, which cover much of the area being rezoned, have adopted wellhead protection plans. These plans provide for the monitoring of land use activities and water quality. And, the County Planning Department protects critical aquifer recharge areas (CARAS) through the County's Critical Areas Ordinance (which was adopted through a settlement with the State Departments of Ecology, Fish & Wildlife, and Commerce).

F-6 With respect to construction run-off, although the state has a comprehensive regulatory structure which addresses larger projects, the County imposes standardized mitigation on development. Development which will disturb an acre or more is subject to the Department of Ecology's Construction Stormwater General Permit requirements, which includes complying with the Ecology Stormwater Manual for Eastern Washington. The

County addresses stormwater impacts through its SEPA, platting, and building permit review processes, and the Planning Department has standard stormwater mitigation conditions imposed on proposals that are five acres or less, or where otherwise warranted.

F-7 As for water supply adequacy, Aspect evaluated impacts from far greater levels of development than what is proposed. The SEPA Record indicates impacts on White Salmon River flows would be negligible (appellants did not challenge River flow level impacts), and there are adequate supplies, whether water is from an established system or private wells. In addition, demonstration of adequate water availability is required when land is subdivided and building permits are issued.

F-8 The County is aware that after a two-day hearing, and more than two-years after the Hydrologic Report was complete, a witness associated with the appellants filed a complaint and comment letter against two Report authors with state agencies. Responsive materials addressing these objections are within the Record, and have been reviewed by the County Planning Department, Natural Resources Department, and Health Department. The Report authors are widely respected, and have extensive experience in the area covered by their Report. It is widely recognized that appellant witnesses in contested proceedings do not always share the same views. Regardless, these issues have been exhaustively evaluated, and the SEPA review has been upheld by the Hearing Examiner. And, the Hydrologic Report evaluated impacts associated with far greater levels of development than planned for with the Proposal.

#### **G. Cultural Resources**

G-1 Cultural resources are protected through state statute, as implemented by the Department of Archaeology and Historic Preservation (DAHP) and through the County's review under the State Environmental Policy Act, Ch. 43.21C RCW (SEPA).

G-2 County requirements and protocol for addressing these issues within the Subarea are outlined in regulations adopted through a settlement agreement with the Yakama Nation, and guidance developed in consultation with DAHP. These documents are part of the Record.

#### **H: Wildlife Habitat**

H-1 The Proposal does not revise or otherwise lessen protections within the Critical Ordinance Ordinance, which protects fish and wildlife habitat throughout the County. Also, as a policy matter, planning for growth to occur in designated areas provides improved opportunities to protect wildlife habitat on a landscape-wide basis, as the accompanying Resolution addresses.

H-2 With the market-based approaches taken to increasing setbacks in the Husum area, and providing an alternative approach for residential development in the RL zone to the RL evaluation process (which can result in higher densities from residential clustering), the Update incorporates mitigation for wildlife habitat preservation.

## **I. Aesthetic and Recreational**

I-1 The County zoning code and Shoreline Master Program include the background setback, height, and other requirements which govern development in the Planning Area. In addition, aesthetic impacts are addressed by the unique approach taken to development along the White Salmon River, which provides an incentive to increase setbacks. This is discussed in section E above.

I-2 This "two-pronged" approach (regulations coupled with an incentive structure) protects recreational activities along the White Salmon River. While densities do increase, what is proposed is relatively modest, and balanced against the need to plan for growth and encourage it to locate where growth is occurring and infrastructure can best be provided.

## **J. Policy Approach on Update - Comprehensive Plan**

J-1 Overall, the Update, as set forth in the Attachments, would improve land use planning, by directing population to the "4% Area" at designated, and predictable densities. Focusing residential development in the 4% Area, where land is already being divided; where infrastructure is better; and, where services can be more efficiently provided, will better protect County resource lands, than planning for more dispersed residential growth throughout the entire Planning Area. Such an approach is intended to result in reducing County capital expenditures over time. This approach is consistent with the County Comprehensive Plan.

J-2 Consistent with Plan objectives, as articulated throughout this Ordinance, both property rights and environmental values are respected. Growth is planned for where it can be better supported by existing infrastructure, and where it is already occurring. This approach to planning for residential development is consistent the goal and policies found in the Plan's "Environment/General" section, with maintaining natural resource based uses, and is protective of recreational uses along the White Salmon River.

J-3 The Board has reviewed the Record, including the Staff Report and Planning Commission recommendation, SEPA Record, and extensive public comment submitted. For a County of Klickitat's size, the effort and analysis put into this Update, which allow a modest increase in population growth in the location best suited to provide for it, is extraordinary.

J-4 The Board deems it to be in the public interest, and consistent with protecting the public, health, safety, and welfare, to adopt the attached plan and regulatory revisions, and complete the Husum BZ Corner Subarea Plan Update.

## **Section 2. Adoption.**

THE FOLLOWING ARE ADOPTED:

A. Attachment A. The County zoning maps are hereby amended, and properties rezoned as set forth in Attachment A.

B. Attachment B. The Husum BZ Corner Subarea Plan and implementing regulations are hereby superseded by the attached Husum BZ Corner Subarea Plan and regulations, as set forth in Attachment B. The regulations shall be codified within the County Zoning Code. The Subarea Plan replaces the existing Comprehensive Plan's Husum BZ Corner Subarea Plan.

C. Attachment C. The County Comprehensive Plan and Maps are hereby amended as set forth in Attachment C.

**Section 3. Severability.** The provisions of this ordinance are declared separate and severable. The invalidity of any portion of this ordinance shall not affect the validity of the remainder of the ordinance.

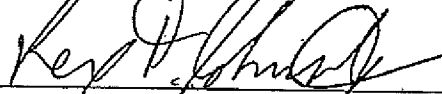
**Section 4. Effective Date.** This ordinance shall take immediate effect.

ADOPTED this 5th day of June, 2012.

  
Ray Thayer, Chairman

**Absent**

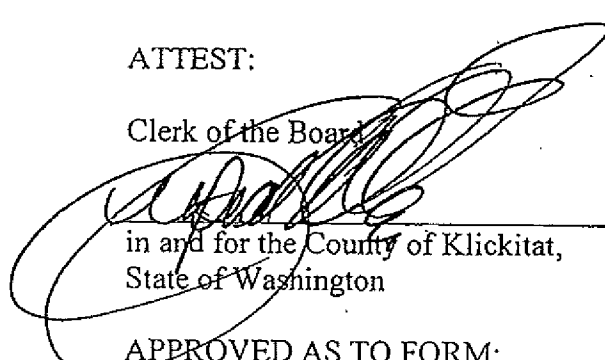
David Sauter, Commissioner

  
Rex F. Johnston, Commissioner

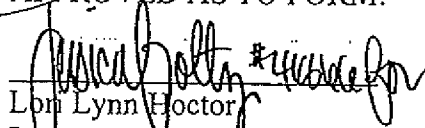
Constituting the Klickitat County  
Board of Commissioners  
Klickitat County, Washington

ATTEST:

Clerk of the Board

  
in and for the County of Klickitat,  
State of Washington

APPROVED AS TO FORM:

  
Lori Lynn Hootor  
Prosecuting Attorney

RESOLUTION NO. 08612\_\_

A RESOLUTION OF KLINKITAT COUNTY, WASHINGTON RELATING TO LAND USE PLANNING WITHIN THE HUSUM BZ CORNER PLANNING AREA, AND THE PILOT FOREST, FARMING AND RANCHING RESOURCE PROTECTION PROJECT.

WHEREAS, the County has looked to alternative strategies for protecting forestry, farming, ranching, fishing, and river rafting interests, while responsibly siting residential development; and,

WHEREAS, the County has considered market based solutions to encourage focused development in areas best suited for residential development, and to conserve other areas best suited for resource-based use; and,

WHEREAS, while protecting economic interests based on natural resources, the County has also assessed options for facilitating landscape-level approaches to conserving wildlife habitat; and,

WHEREAS, in exploring market-based tools to assist in achieving its planning objectives, the County has outlined a Pilot Farm, Forest, and Ranching Protection Project, or FFR; and,

WHEREAS, the FFR is designed to encourage large lot preservation in the Husum BZ Planning Area, and allow for alternative, comprehensive approaches to mitigation which respect property values; and,

WHEREAS, the FFR structure is patterned on the RL approach to rating lands for development and resource suitability, and designed to be consistent with the Critical Areas Ordinance; and,

WHEREAS, to achieve these objectives, it is appropriate to outline the program structure by resolution, and require further work and analysis on this program; and,

NOW THEREFORE BE IT RESOLVED,

The Planning Department is hereby directed to prepare an FFR Guidance Supplement on the attached Appendix A, which is hereby adopted, and to report back to the Commissioners on the FFR Guidance Supplement six (6) months from July 1.

ADOPTED this 5th day of June, 2012.

Ray Thayer  
Ray Thayer, Chairman  
Absent

David Sauter, Commissioner  
Rex F. Johnston  
Rex F. Johnston, Commissioner

Constituting the Klickitat County  
Board of Commissioners.  
Klickitat County, Washington

ATTEST:

Clerk of the Board

[Signature]  
in and for the County of Klickitat,  
State of Washington

APPROVED AS TO FORM:

[Signature] #44444 for  
Lori Lynn Hector  
Prosecuting Attorney

## Appendix A: Pilot Forest, Farming, and Ranching Resource Protection Project

**A.010 Purpose.** The Pilot Forest, Farming, and Ranching Resource Protection Project (FFR), is a pilot project applicable only within the Husum-BZ Planning Area, which is designed to:

- A. Provide a voluntary, market-based tool to encourage resource lands preservation while focusing residential development where infrastructure and services are located.
- B. Encourage conservation of resource lands within the Husum BZ Corner Planning Area for resource use.
- C. Provide a mitigation alternative when on-site conservation measures are not practicable, when using the FFR is preferable to on-site measures, or can address impacts more comprehensively.

**A.020 Applicability.** The FFR only applies within the Husum BZ Corner Planning Area.

### A.030 Sending Areas

- A. Large/Open Space Lots. Lots zoned RL within the Planning Area whose property owners agree to not further divide specified lot(s) are eligible for credits.
- B. Setbacks. Lots increasing setback requirements effective on the date this section was adopted, along the White Salmon River, Rattlesnake Creek, Indian Creek, and/or Gilmer Creek are eligible for credits.

### A.040 Receiving Areas

- A. South Husum Overlay. Eligible properties are those which: (1) will be developed consistent with a minimum 200 foot setback from the White Salmon River; and (2) are within a public water system service area and serviceable by either (a) a community wastewater system; or (b) public wastewater system within six years, as demonstrated by a certificate from the relevant provider confirming service availability. The South Husum Overlay is applied to a property through the rezone process.<sup>1</sup> It allows a property owner to develop under either RR1 or RR2 zoning.
- B. Resource Lands. Eligible properties are those zoned RL, which are subject to the Resource Lands Evaluation process.

**A.050 Alternative Banking Option.** Credits may be used to address habitat protection requirements, *e.g.*, as an alternative to mitigation required through the Critical Areas Ordinance.

**A.060 Guidance.** The Planning Department shall implement this chapter consistent with the FFR Guidance adopted as part of this chapter. The FFR Guidance shall be maintained on file with the Planning Department.

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<sup>1</sup> This approach cannot be used without County Commissioner approval.



## FFR GUIDANCE

**Credit Certificate Approval.** Credits must be approved by the Planning Department through a Credit Certificate Approval. The Department may not issue a Credit Certificate Approval unless it is consistent with Title 19 and the FFR Guidance. The Credit Certificate Approval shall identify what the credit may be used for.

As a condition of the Credit Certificate Approval, the credit generator must execute a permanent conservation easement, covenant, or other legal instrument, in a County approved form, becomes effective and must (before credit use) be recorded against the property generating the credit, and on the property receiving the credit.

**Credit Valuation for South Husum (SH) Overlay and RL Evaluations.** Credit valuation shall substantially conform to the below ratios and criteria. A single lot could both generate and receive credits.

Habitat and resource land values which shall be determined generally consistent with RL and Critical Areas Ordinance criteria. However, for purposes of the FFR:

- River/stream setbacks areas, up to 300 feet, shall be presumed to be high value habitat; credits are limited to setback areas extending to 300 feet.
- Habitat for state or federal threatened or endangered species is also presumed to be high value habitat.
- Land suitable for agriculture, ranching, or forestry, and in such use for three of the past five years, is presumed to be high value resource.

The SH Overlay requires conservation of a set number of acres for each acre of the SH Overlay. For example, 50 acres of Overlay would require restrictions on further division of 50 acres of high value habitat or high value resource land.

	SH Overlay
<b>Low Value Resource</b>	
Large/Open Space Lots	3:1
<b>Medium Value Resource</b>	
Large/Open Space Lots	2:1
<b>High Value Habitat or Resource</b>	
Large/Open Space Lots	1:1
River/Stream Setbacks	1:1

To obtain additional (more than one) resource lands evaluations, counting evaluations completed after FFR adoption, a set number of credits shall be required to obtain the evaluation, in substantial conformity with the table below. For example, where the evaluation is on land characterized as being of high resource value, three acres of "large lot" or "setback" for every acre undergoing evaluation shall be preserved, consistent with the FFR.

	RL/Low Value	RL/Med. Value	RL/High Value
<b>Habitat or Resource</b>			
Large/Open Space Lots	1:1	2:1	3:1
River/Stream Setbacks	1:1	2:1	3:1

**Alternative Banking Option.** Credits may be generated for the permanent preservation of lands for agricultural, ranching, or forestry uses which are operating subject to a County approved habitat conservation plan or agreement. For purposes of the FFR, applicable lands must be of both high value for resource use and also high value habitat. Mitigation shall be designed substantially consistent with criteria in the critical areas ordinance for developing habitat mitigation plans, and in consultation with relevant agencies, including WDFW. Credits may then be allocated to recipients required to mitigate for incursions into critical areas setbacks, consistent with the Credit Certificate Approval process set forth above. For receiving properties to use these credits, the protections must be permanent.

The Planning Department shall develop an FFR Guidance Supplement specifically addressing banking, which shall be reviewed by the County legislative authority, before a project is approved under the Resource Lands Banking Alternative. The Supplement shall be consistent with the Forest Practices Rules for forestry uses, and shall address best practices for ranching and agricultural uses. The FFR Guidance Supplement shall address the entirety of the FFR Pilot Program, including the Wild & Scenic River RR2 Overlay.

**Tab 3**

**Superior Court Summary Judgment  
Decision County Appealed to this Court  
CP 1536-42**

FILED  
2013 JUL 31 PM 4:09

SCOTT G. WEBER, CLERK  
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

FRIENDS OF THE WHITE SALMON RIVER  
and FRIENDS OF THE COLUMBIA GORGE,

Plaintiffs-Petitioners,

v.

Klickitat County,

Defendant-Respondent.

Cause No. 12-2-02455-7

**FINAL ORDER AND  
JUDGMENT GRANTING  
PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

This matter came before the court on cross-motions for partial summary judgment filed by Plaintiffs and Defendant. Plaintiffs challenged the Defendant with Washington State Environmental Policy Act ("SEPA") claims, Planning Enabling Act ("PEA") claims and constitutional claims resulting from a broad-scale rezone of property along the White Salmon River via the enactment and passage of Klickitat County Ordinance No. 0060512-1 and Klickitat County Resolution No. 08612 (collectively, the "Rezone").

This court heard oral argument on February 28, 2013, and Plaintiffs asked the court to vacate the SEPA Mitigated Determination of Non-Significance ("MDNS") issued by Klickitat County ("County") on November 5, 2010 for the Rezone through the adoption of amendments to the Husum/BZ Corner Sub-Area Plan and zoning/text update and order Klickitat County to prepare an Environmental Impact Statement pursuant to SEPA for the Rezone.

1 The court considered the motions, responses and replies, along with the record, the  
2 attachments and supporting declarations, and ruled in favor of the Plaintiffs on all of their claims  
3 in the Order on Cross Motions for Summary Judgment incorporating the court's May 27, 2013  
4 letter opinion, which are attached and incorporated herein. Summary judgment is granted where  
5 there are no genuine issues of material fact and the moving party is entitled to judgment as a  
6 matter of law. CR 56. Therefore, the court ORDERS as follows:  
7

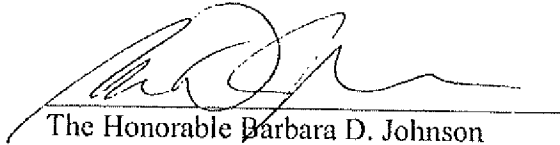
8 1. As set forth in the court's Order on Cross Motions for Summary Judgment  
9 entered July 5, 2013, incorporating the court's May 27, 2013 letter opinion, summary judgment  
10 in Plaintiffs' favor is warranted, Plaintiffs' partial motion for summary judgment is GRANTED  
11 and Defendant's cross-motion for summary judgment is DENIED.  
12

13 2. This final order adjudicates fewer than all the claims brought by Plaintiffs in this  
14 case. Under Rule 54(b), this court finds that (1) Plaintiffs' unadjudicated claims are addressed  
15 by the relief provided by this ruling, (2) there are no other legal questions that have been  
16 presented to this court at this time, (3) there is no likelihood that further developments in this  
17 court could moot any issues on appeal, (4) further litigation of the remaining claims in this case  
18 is not necessary at this time and an immediate appeal will simplify further litigation, if any, and  
19 (5) the practical effect of allowing an immediate appeal is the just and efficient administration of  
20 justice and there is no just reason for delay. Plaintiffs may pursue their remaining claims if any  
21 part of the court's final judgment contained herein is overturned on appeal.  
22  
23  
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26

1           3.       Plaintiffs have withdrawn their request for permanent injunctive relief. Their  
2 request for order declaring Klickitat County Ordinance No. 0060512-1 and Klickitat County  
3 Resolution No. 08612 ultra vires and void are reserved pending outcome of this case on appeal.  
4

5           4.       Plaintiffs are the prevailing party for purposes of an award of costs and fees under  
6 RCW 4.84. Plaintiffs may file a bill of costs and fees incurred in bringing this action consistent  
7 with applicable rules within 10 days of the entry of this final order and judgment.

8  
9                               §  
10       ORDERED THIS 31 DAY OF JULY 2013

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12                               The Honorable Barbara D. Johnson  
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Hearing: Friday, July 5, 2013  
Time: 9:00 A.M.  
Judge: Judge Barbara D. Johnson

FILED

2013 JUL -5 AM 10:58

SCOTT G. WEBER, CLERK  
CLARK COUNTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

FRIENDS OF THE WHITE SALMON RIVER  
and FRIENDS OF THE COLUMBIA GORGE,

Plaintiffs/Petitioners,

v.

Klickitat County,

Defendant/Respondent.

Cause No. 12-2-02455-7

ORDER ON CROSS MOTIONS FOR  
SUMMARY JUDGMENT

~~(proposed)~~

This matter came before the Court on:

1. Klickitat County's Motion For Partial Summary Judgment On Constitutional Claims, Spot Rezone Claim, And Related Ch. 36.70 RCW Claims ("County's Motion") on February 28, 2013. The Court considered the County's Motion, with the attachments; Plaintiffs' Response To Defendant's Motion For Partial Summary Judgment; and Klickitat County's Reply On Its Motion For Partial Summary Judgment On Constitutional Claims, Spot Rezone Claim, And Related Ch. 36.70 RCW Claims, along with the Record filed in this matter; and,

2. Plaintiffs' Cross-Motion for Partial Summary Judgment, on February 28, 2013 ("Plaintiffs' Motion"). The Court considered Plaintiffs' Motion, with attachments, Plaintiffs' Amended Motion For Partial Summary Judgment, Klickitat County's Opposition To Friends'

ORDER - 1

LAW OFFICES OF  
SUSAN ELIZABETH DRUMMOND, PLLC  
5400 CARILLON POINT  
BLDG. 5000, SUITE 476  
KIRKLAND, WA 98033  
206.692.0767

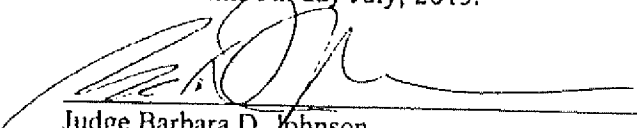
1 Amended Motion For Partial Summary Judgment, and Plaintiffs' Reply In Support Of Motion  
2 For Partial Summary Judgment, with attachments, and the Record filed in this matter; and

3 As set forth in the Court's letter opinion, which is attached as Appendix A and  
4 incorporated herein by reference, the Court ORDERS as follows: *2d set forth letter opinion*

5 The County's Motion is denied and Plaintiffs' Motion is granted. ~~This order is dispositive~~  
6 ~~as to all issues and constitutes the final judgment in this action.~~

7 Attorney fees and costs are ~~the responsibility of each party.~~ *each party - 100% liability 100% herein*


8  
9  
10 DONE IN OPEN COURT this 5th day July, 2013.

11   
12 Judge Barbara D. Johnson  
13

14 Presented by:

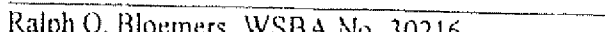
15 LORI LYNN HOCTOR  
16 Prosecuting Attorney for Klickitat County, and

17 LAW OFFICES OF  
18 SUSAN ELIZABETH DRUMMOND, PLLC

19   
20 Lori Lynn Hoctor, WSBA #39009  
21 Susan Elizabeth Drummond, WSBA #30689  
22 Attorneys for Respondent Klickitat County

23 Approved as to Form;

24 CRAG LAW CENTER

25   
26 Ralph O. Bloemers, WSBA No. 30216  
Counsel for Plaintiffs

ORDER - 2

LAW OFFICES OF  
SUSAN ELIZABETH DRUMMOND, PLLC  
5400 CARILLON POINT  
BLDG. 5000, SUITE 476  
KIRKLAND, WA 98033  
2063687-0767



SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR CLARK COUNTY

DEPARTMENT NO. 6  
P.O. BOX 5000  
VANCOUVER, WA 98666-5000



BARBARA D. JOHNSON  
JUDGE

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May 27, 2013

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RE: Friends of the White Salmon River and Friends of the Columbia Gorge v. Klickitat County  
Clark County Cause No. 12-2-02455-7

Dear Counsel:

This letter is to advise of the court's decision as to the parties cross-motions for partial summary judgment argued before the court on February 28, 2013. For the reasons stated briefly below, the court finds in favor of Plaintiffs as to both Motions.

First, it is noted the court orally granted Plaintiffs' Motion to Correct the Certified Record. It appears from the Clerk's records no Order was entered after the hearing on the motions to finalize this ruling, and there was some argument as to the language of the proposed Order. In order to clarify the record for the court's rulings herein, the court enters Plaintiffs' proposed Order Granting Plaintiffs' Motion to Correct the Record on Review to finalize the oral ruling. A conformed copy is enclosed.

Defendant's Motion for Partial Summary Judgment on Constitutional Claims, Spot Rezone Claim, and Related CH. 36.70 RCW Claims is addressed to Plaintiffs' "Delegation Claims." This court finds Plaintiffs have standing and have the right to challenge factual findings of fact and conclusions of law in this proceeding. Defendants are not entitled to summary judgment of dismissal as to the claims.

Plaintiffs' Amended Motion for Partial Summary Judgment is a lengthy document, eighty-three pages in length. The memorandum does not begin with a brief statement of the claims addressed by Plaintiffs' Motion. However, there is a Statement of the Issues to be Decided at p. 53-54 which sets forth Plaintiffs' claims. The court concludes the County violated SEPA by failing to prepare an EIS for this extensive rezone. The County failed to adequately consider a reasonable range of alternatives,

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failed to consider adverse impacts, and improperly relied upon the FFR Program, which is incomplete and has never been finalized as mitigation. The court also concludes the County unlawfully delegated the right to individual landowners to upzone their land, and the RR-2 overlay constitutes unlawful spot zoning.

It is requested counsel prepare an Order setting forth the court's ruling in granting and denying the parties' Motions for Partial Summary Judgment. Plaintiffs have indicated the court's ruling on these issues is dispositive of this case. If correct, this court has no objection to findings being entered to allow appeal pursuant to CR 54(b).

Sincerely,

A handwritten signature in black ink, appearing to read 'Barbara D. Johnson', with a long horizontal flourish extending to the right.

Barbara D. Johnson

Enclosure

# LAW OFFICES OF SUSAN ELIZABETH DRUMMOND, PLLC

**January 10, 2014 - 2:32 PM**

## Transmittal Letter

Document Uploaded: 452693-Appellant's Brief.pdf

Case Name: Klickitat County v. Friends of the White Salmon River and Friends of the Columbia Gorge

Court of Appeals Case Number: 45269-3

**Is this a Personal Restraint Petition?** Yes ☐ No ☒

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Susan E Drummond - Email: **susan@susandrummond.com**

A copy of this document has been emailed to the following addresses:

susan@susandrummond.com